Petition

81-235

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ALEXANDER L. STEVAS,
CLERK

No. 81-

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

PUGET SOUND POWER & LIGHT COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

and

WASHINGTON STATE DEPARTMENT OF FISHERIES, WASHINGTON STATE DEPARTMENT OF GAME, MUCKLESHOOT INDIAN TRIBE, AND SECRETARY OF THE INTERIOR,
Intervenors.

PETITION FOR WRIT OF CERTIORARI TO THE FEDERAL COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals unconstitutionally extend the power of the federal government beyond the limits of the Commerce Clause and prior Supreme Court decisions by expanding the definition of navigability in a manner which subjects virtually every stream and creek in the nation to federal control?

2. Did the Court of Appeals ignore the jurisdictional fact doctrine of *Crowell* v. *Benson* which requires the federal courts to make de novo determinations of constitutional and jurisdictional facts when reviewing the decisions of the Federal Energy Regulatory Commission?

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PETITION FOR WRIT OF CERTIORARI TO THE FEDERAL COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Puget Sound Power & Light Company, prays that a writ of certiorari issue to review the decision of the Federal Court of Appeals for the Ninth Circuit holding that the White River is a navigable water of the United States and that Petitioner's White River hydroelectric facility is therefore subject to the jurisdiction of the Federal Energy Regulatory Commission.

OPINIONS BELOW

The opinion of the Federal Court of Appeals for the Ninth Circuit affirming the decision of the Federal Energy Regulatory Commission (the "FERC" or the "Commission") that the White River is a navigable water of the United States at the location of Petitioner's hydroelectric facility is published at 644 F.2d 785 (1981), and set out as Appendix A.

The Administrative Law Judge's opinion finding that the relevant stretch of the White River is *not* a navigable water of the United States is published at 13 Fed. Power Serv. 5-352 (March 3, 1976), and set out as Appendix B.

The decision of the Commission reversing the finding of the Administrative Law Judge and holding that the relevant stretch of the White River is a navigable water of the United States is published at 13 Fed. Power Serv. 5-332 (October 28, 1977), and set out as Appendix C. The Commission's opinion and order denying rehearing is published at 15 Fed. Power Serv. 5-1069 (August 9, 1978), and set out as Appendix D.

JURISDICTION

The decision of the Federal Court of Appeals for the Ninth Circuit was entered on May 4, 1981. This Petition is being filed within 90 days of that date as prescribed by Supreme Court Rule 20.2 and 28 U.S.C. § 2101(c). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner contends that the Commission's decision that the White River is navigable and that Petitioner's White River hydroelectric facility is therefore subject to its jurisdiction constitutes a violation of Article I, Section 8, Cl.3 of the United States Constitution, commonly known as the "Commerce Clause." Article I, Section 8, Cl.3 confers upon Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The complete text of Article I, Section 8 of the United States Constitution is set forward in Appendix E of this Petition.

Petitioner also contends that by unconstitutionally expanding its power beyond the limits of the Commerce Clause, the Commission violated the Tenth Amendment. The Tenth Amendment provides in full:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The statutory provisions under which Petitioner asserts that the relevant stretch of the White River is not navigable are Sections 23(b), 4(e) and 3(8) of the Federal Power Act. Each of these sections of the Federal Power Act is set forth in its entirety in Appendices F, G and H of this Petition, respectively.

STATEMENT OF THE CASE

1. The Nature of the Case

Petitioner seeks review of the decision of the Federal Court of Appeals for the Ninth Circuit affirming: (a) the decision of the Federal Energy Regulatory Commission that it has jurisdiction over the White River on the ground that the White River is a "navigable water of the United States"; and (b) the Commission's order that Petitioner must apply for a license from the Commission to continue operating its White River hydroelectric facility. The Commission's decision and order were appealed to the Federal Court of Appeals for the Ninth Circuit pursuant to Section 313(b) of the Federal Power Act (16 U.S.C. § 8251(b)).

2. The Course of the Proceedings Below

The Administrative Law Judge issued an opinion on March 3, 1976, concluding that a license for Petitioner's White River hydroelectric facility was not required on any of the grounds, including navigability, alleged by any of the parties. 13 Fed. Power Serv. 5-352.

Exceptions to the Initial Decision were filed by the Commission staff and intervenors, and on October 28, 1977, the Commission issued an order in which it reversed its Administrative Law Judge on the sole basis that the White River was a

"navigable water of the United States" at the facility's location. (R. 1853-1877.) Navigability was the only issue that the Commission decided.[1] In regard to the other issues the Commission stated:

> In view of our finding herein that the White River is a navigable water of the United States at least as far upstream as Puget Power's diversion dam at Buckley, we do not reach and will not, therefore, address the other theories of jurisdiction. . .

(R. 1860.)

On November 25, 1977, pursuant to Section 313(a) of the Federal Power Act, 16 U.S.C § 8251(a), Petitioner filed an application for a rehearing of the Commission's order reversing the Administrative Law Judge. This application was denied on August 9, 1978. (R. 1899-1906.)

An appeal was thereafter promptly made to the Ninth Circuit pursuant to Section 313(b) of the Federal Power Act (16 U.S.C. § 8251(b)) which affirmed the order of the Commission on May 4, 1981. Petitioner now seeks review of the Ninth Circuit's decision by virtue of the Court's jurisdiction under 28 U.S.C. § 1254(1).

3. Statement of Facts

a. Description of the Project

Petitioner's hydroelectric facility was built in 1911 and is located on the upper reaches of the White River, a short glacial stream.

Pursuant to perfected water rights, Petitioner diverts some of the water from the White River at Buckley, Washington for the facility (R. 275.) The diverted water flows into a wooden flume and into a storage basin, called Lake Tapps. From Lake Tapps the water flows down penstocks into the generating

[1] The Commission staff also claimed that the Commission has licensing jurisdiction over Petitioner's facility on several other grounds, including specifically that the facility allegedly generates power for transmission into interstate commerce. This Petition does not involve the Commission's authority to assert jurisdiction over Petitioner's White River facility on any of these other grounds.

plant. After passing through the plant, the water is returned to the river through an unlined tailrace channel. (R. 45, 1433-1434.) The flow line from the point of diversion out the tailrace is approximately 14 miles long. (R. 499; Ex. 1.)

b. Description of the River

Knowledge of the adverse physical characteristics of the White River is fundamental to an understanding of the impact of the Court of Appeals' extension of the definition of navigability. The White River originates from the Emmons Glacier on Mount Rainier in Washington State (R. 1858) and takes its name from its high glacial sediment content which often appears milky white.[2] This mountain stream contains a great deal of drift, snags and other obstructing forest debris, making the bed and course unstable. Prior to 1906, the White River flowed into the Duwamish River. In 1906 debris diverted the White River away from the Duwamish River into a new channel following a small creek called the Stuck which then flowed into the Puyallup River. (R. 55.) For this reason the Administrative Law Judge characterized the White as a "changing animal."

The upper White River, the relevant portion, is characterized by a low stream flow and steep slope common to other glacial streams. The slope and average annual flow of the stream from the beginning of Petitioner's wooden flume to the tailrace outlet are 32 feet per mile and 1,400 cfs, respectively. (R. 141.) The slope, or drop, is uniformly steep throughout.

c. Use of the River

No evidence has been presented that the portion of the White River between the inlet to Petitioner's wooden flume and the tailrace outlet is presently suitable for navigation. (R. 1864.) No one has claimed that the river could in the future be made suitable for navigation through reasonable improvements. (R. 1864.) The Court of Appeals agreed:

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[2] The White River now empties into the Puyallup River. Because of its unusually high sediment content, the White River adversely affected the ability of the Corps of Engineers to make even the mouth of the Puyallup River navigable. A Corps official said: "I very seriously question the possibility of maintaining the [Puyallup waterway], except at great expense, if the [White] River continues to empty into it." (R. 1074, Ex 53.)

> In this case, no evidence was offered to establish either that the relevant stretch of the White River is presently navigable, or that it could be made navigable through reasonable improvements.

644 F.2d at 787.

The only evidence that the river was allegedly suitable for navigation occurred in the past, around the turn of the century. The use relied upon by the Court of Appeals was the "driving" of shingle bolts.[3] Shingle bolt driving, being a relic of the past, requires definition. Shingle bolts are very short pieces of cedar which have been split, creating a triangular shape. (R. 256.) The typical length of four and a half feet is not much longer than fireplace wood. "Driving" shingle bolts required teams of men and horses (not boats) literally dragging and constantly handling the shingle bolts along wet (or dry) channels. This "driving" also required use of privately owned banks, which meant illegal trespassing was necessary for the "drives."

Shingle bolts are dramatically smaller than the tree trunk sized logs referred to in court opinions as "saw logs." (*Infra* at 17.) Saw logs are entire trees less branches and it would take dozens of shingle bolts to make the equivalent of just one saw log. Flotation of the much larger saw logs has been the absolute minimum test of navigability in federal case law until now.

d. Prior Determination of Nonnavigability

In 1913, the Washington State Supreme Court held that the White River was not navigable simply because shingle bolts could be dragged and driven along the beds and banks of the river by teams of men and horses. *Sumner Lumber & Shingle Co.* v. *Pacific Coast Power Co.*, 72 Wash. 631, 131 P. 220 (1913).

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[3] Other parties contended there was evidence of sporadic Indian canoeing with light, shallow draft canoes. The Court of Appeals refused to rely on this debatable evidence. No evidence at all exists or could exist to show use of steamships, barges or other such craft usually associated with the concept of "navigation".

The Administrative Law Judge found the facts and reasons expressed in *Sumner Lumber* persuasive and in large part that led to his decision that the White River was not navigible. His opinion stated:

> Ignoring a local court's evaluation in 1913 on the same facts urged 70 years later borders on the absurd. We are still faced with a lack of convincing evidence that the short stretch of river here supported a reasonable commercial enterprise on the basis of the stream's natural or ordinary navigability. As far as navigability was concerned even with aids, the [Washington Supreme Court's] decision shows the marginal aspects of the operation, the limited water available for navigation and the need for use of the stream banks as an auxiliary aid for even the navigation attempted.

13 Fed. Power Serv. at 5-360-361 (Appendix B at 12b).

The Court of Appeals conceded that the Administrative Law Judge applied the "proper test" of navigability, but without any explanation said the Washington State Supreme Court did not.[4] Both the Administrative Law Judge and the Washington State Supreme Court were concerned that navigation cannot be found where such small pieces of wood required constant handling, dragging and "driving" over beds and banks by teams of men and horses. Evidence in the *Sumner Lumber* case showed that if constant handling of shingle bolts qualifies a stream as navigable, even a creek whose water could fit into a 6-inch pipe would qualify:

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[4] The Washington State Supreme Court recognized that under *proper* circumstances, shingle bolt *flotation* may evidence navigability. The *Sumner Lumber* case cited *Monroe Mill Co.* v. *Menzel*, 35 Wash. 487, 77 P. 813 (1904), which the Ninth Circuit Court of Appeals also cited. But that case emphasized that if shingle bolt driving required use of banks, it would constitute an illegal trespass which would not be allowed:

> [T]he timber driver must confine himself and his operations to the highway itself —the bed of the stream—until the landowner consents to the use of the banks, or until the right to their use has been acquired in a lawful way. If more emphatic statement of that rule is necessary, we now wish to be understood as making it with all needed emphasis. The fundamental principle of right in the landowner to control his own premises, outside of the bed of the stream, must not be violated.

35 Wash. at 498.

As the Administrative Law Judge found, the banks of the White River were needed for the drives, which was one example of the "marginal" aspects of the operation." 13 Fed. Power Serv. at 361 (Appendix B at 12b)

> The Cedar River is considerably slower than the Nisqually or the White, nevertheless it could be floated in the same way, by people going along the banks and floating the bolts. *In fact, there is hardly any stream that is not.* I noticed a little stream the other day, a little stream in Whatcom County, and it is the outlet for a great lot of stumpage; the entire flow of the stream would pass through a 6-inch pipe; when the channel is full with shingle bolts, when the river rises, men go along the banks with pike poles and work them along in the water and get them down.

(R. 1622; emphasis added)

For reasons detailed below, if the possibility of driving such pieces of wood *with constant handling from the banks* is the proposed minimum test of federal navigability and constitutional jurisdiction, then this test goes too far and must be rejected.

e. Impact of Extension of Navigability

If the White River is deemed navigable, the Commission will be able to take Petitioner's facility without just compensation. The Commission's regulatory powers are extraordinary; they include the power to compel Petitioner to sell its facility for the original cost of the facility (in 1911) less accumulated depreciation, instead of at fair market value. For this still valuable facility, a finding that the White River is navigable will mean that the federal government could require its sale for nothing or next to nothing. (*Infra* at 20-21.)

Other adverse ramifications for the states and individuals will also follow from the Commission's extension of the test of navigability. States will now discover that they have lost their power to control the activities on the narrow streams and creeks within their borders. Owners of bridges or other structures over waters which will now qualify as navigable will be subject to the federal government's power to order those bridges or structures removed without compensation. Riparian owners will lose their property rights to the bed and banks of these newly

"navigable" streams. And both the states and individuals will find that admiralty law may now govern disputes involving these waters.

All of these effects of a jurisdictional finding of navigability were ignored by the Commission and the Ninth Circuit.

f. The Commission's Lack of Regulatory Interest in Navigation

It is important to recognize that in this case the Commission has no interest in navigation per se. Both the Commission and the Court of Appeals have acknowledged that the White River is *not now navigable and cannot be made navigable by the Commission or anyone else.* 644 F.2d at 787. The Commission's claim of navigability in the past is thus only an excuse to exercise regulatory power *for purposes totally unrelated to navigation.*[5] Navigation is an excuse for jurisdiction, not a reason for it.

Because the Commission is not interested in navigation per se, it will assume no responsibility for the adverse practical consequences flowing from its determination that the White River is navigable. When *authority* to assert power is separated from *responsibility* for the consequences, a tendency to expand and to abuse becomes much easier. The Commission will tend to "find" navigability where others, restrained by responsibilities relating to navigation, would not consider asserting jurisdiction. Other federal agencies, such as the United States Corps of Engineers, who have responsibility for the day-to-day, practical consequences of a finding of navigability, have never considered the White River navigable. (*Infra* at 16n.8.) United States military officers, in transportation survey reports dating back to 1854, found the White River "clearly unfit for navigation." 13 Fed. Power Serv. at 5-357(Appendix B at 8b.)

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[5] This lack of real concern for navigation was shown in 1974 at the prehearing conference when the Commission did not argue navigation as a basis for jurisdiction. Other grounds, not here pursued, were urged then (R. 12).

REASONS FOR GRANTING THE WRIT

Review should be granted in this case for the following two reasons.

First, the Court of Appeals' decision conflicts with settled principles of law. The Court therefore should arrest this unwarranted extension of federal power into reaches of streams and rivers never before considered navigable in violation of the Commerce Clause.

Second, review should be granted because this case presents the Court with the opportunity to resolve the conflict among the circuits on the jurisdictional fact doctrine established in *Crowell* v. *Benson,* 285 U.S. 22 (1932).

1. The Commission's New Expansion of the Definition of "Navigable Waters of the United States" Violates the Commerce Clause

The proper scope of the federal government's regulatory powers under the Commerce Clause in light of the reservation of power contained in the Tenth Amendment is the issue in this case.

An agency of the federal government, the FERC, maintains that because shingle bolts were once driven over the upper reaches of the White River: (1) that river is therefore a "navigable water of the United States"; and (2) all activities upon the White are consequently subject to the control of the federal government—specifically the licensing jurisdiction of the FERC.

In reality, the White River has such adverse physical characteristics that it could never be considered a "navigable water of the United States." Furthermore, the manner in which the shingle bolts were dragged down the stream bed demonstrates, if anything, a lack of navigable capacity rather than the level of evidence required by the Supreme Court for establishing navigability. If the classification of the White River as a "navigable water of the United States" is permitted to stand, virtually every creek and stream in the nation will be regarded

as navigable and thus subject to federal regulation. Such a result would be an unwarranted and unconstitutional expansion of the federal government's power beyond the limits authorized by the Commerce Clause and the Tenth Amendment.

a. The Federal Government's Power to Regulate the Navigable Waters of the United States Derives from, and Cannot Exceed, the Grant of Authority in the Commerce Clause

The power of the federal government to regulate the navigable waters of the United States is not expressly granted in the Constitution, but is rather incidental to the Constitution's express grant of power to the federal government to regulate commerce with the foreign nations and among the several states and with the Indian tribes. *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 404-05 (1940); *Leovy* v. *United States*, 177 U.S. 621, 632 (1900). Consequently, only those waters which are truly "capable of use as interstate highways" are subject to the federal government's absolute control over matters involving navigation or improvements. *United States* v. *Appalachian Electric Power Co., supra* at 404; *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703 (1899); *United States* v. *River Rouge Improvement Co.*, 269 U.S. 411, 419 (1926). Those bodies of water which are not conducive to navigation or are used solely for "intrastate commerce" do not fall within the category of "navigable waters of the United States" and remain within the exclusive domain of the states and their citizens to regulate or not regulate as they see fit. *Gibbons* v. *Ogden*, 9 Wheat. 1, 6 L.Ed. 23 (1824).

b. Defining What Waters Are Navigable Is of Constitutional Significance

Because the federal government can assert its regulatory power over a body of water on the ground that it is a "navigable body of water of the United States" if that assertion is consistent with the grant of authority contained in the Commerce Clause, every determination of navigability by the federal government has a constitutional significance. In those cases where the federal government overextends its regulatory

jurisdiction, it is the function of the Supreme Court to decide "whether the complex of the conditions in respect to [the body of water's] capacity for use in interstate commerce rendered it a navigable stream within the constitutional requirements." *United States* v. *Appalachian Electric Power Co., supra* at 404. This is just such a case because no court has ever found navigable a stream with such adverse physical characteristics—and the past navigation relied upon as "demonstrating" navigable capacity could be accomplished on virtually any stream bed in the nation. The Court's review is necessary to check an unconstitutional expansion of power by an agency of the federal government.

c. The Supreme Court Has Set Down Practical Limits on the Definition of Navigability

Rather than permit the term, "navigable waters of the United States," to be expanded to the point where it encompasses every river and stream in the nation, the Supreme Court has repeatedly stated that a determination of navigability must be based upon a practical consideration of that body of water's impact on interstate commerce. As the Court stated in *Leovy* v. *United States, supra,* where the navigability of the Red Pass was at issue:

> [I]t is obvious that what the Constitution or the acts of Congress have in view is the promotion and protection of commerce in its international and interstate aspect, *and a practical construction must be put on these enactments as intended for such large and important purposes.*

177 U.S. at 633 (emphasis added).

The Supreme Court has repeatedly recognized that there are definite limits beyond which "navigability" should not be expanded. In *The Montello,* 87 U.S. 430, 442 (1874), for example, the Court noted that the term should not be read so liberally as to eliminate its role as a reminder that the government's power over the waters of this country cannot be extended beyond the limits of the power granted in the Commerce Clause:

> It is not, however, as Chief Justice Shaw said (*Rowe v. Bridge Co.*, 21 Pick. 344), "Every small creek in which a fishing skiff or gunning canoe can be made to float at high water, which is deemed navigable. . ."

Similarly, the Court adopted a reasonable and practical approach to navigability in *The Daniel Ball*, 77 U.S. 557 (1871). There the Court said that only rivers which serve or are capable of serving "as highways for commerce, over which trade and travel are or may be conducted *in the customary modes of trade and travel on water*," fall within the definition of navigable waters of the United States. 77 U.S. at 563 (emphasis added).

A practical test of navigation was again adopted by the Court in *Leovy v. United States, supra.* Confronted by the federal government's claim that a body of water created by an overflow of the Mississippi fell within the definition of "navigable waters of the United States," the Court in *Leovy* responded that a "substantial" amount of commerce must be demonstrated before a finding of navigability can be upheld. 177 U.S. at 632. The Court then said the jury had been improperly instructed that a navigable water was one which, either independently or in conjunction with other water, permitted a continuous journey from one state to another. Such an instruction, the Court noted, would effectively eliminate any meaning from the navigability requirement for virtually all bodies of water would be navigable under this definition:

> *If these instructions were correct, then there is scarcely a creek or stream in the entire country which is not a navigable water of the United States.* Nearly all the streams on which a skiff or small lugger can float discharge themselves into other streams or waters flowing into a river which traverses more than one state, and the mere capacity to pass in a boat of any size, however small, from one stream or rivulet to another, the jury is informed, is sufficient to constitute a navigable water of the United States.
>
> Such a view would extend the paramount jurisdiction of the United States over all the flowing waters in the states. . .

Id. at 633 (emphasis added).

These decisions of the Supreme Court establish that the definition of "navigable waters" has been shaped from practical considerations and given a reasonable interpretation, and that those bodies of water over which only a limited amount of intrastate transportation of goods is conducted with great difficulty do not fall within its grasp.

d. The Commission and the Court of Appeals Each Ignored The Established Limits on the Definition of Navigability and Expanded It to a Point Where Every River in the Nation Will Be Subject to Federal Control

The Commission and the Court of Appeals should have followed the practical test established by the Supreme Court and should have recognized the limits beyond which the concept of navigability cannot be expanded. Instead, the Commission and the Ninth Circuit have now expanded the definition of navigability to the point where any stream bed over which small pieces of wood by "constant handling" can be driven now qualifies as a "navigable water of the United States." In short, the Commission and the Ninth Circuit expanded the definition of navigability in this case to the point feared by the Supreme Court in *The Montello;* for now every creek in the nation more than a foot or two wide and a few inches deep will be subject to federal control.[6]

(i) The Physical Characteristics of the White River Render it Unsuitable for Navigation

Characterized by a steep slope of 32 feet per mile, the 18-mile stretch of the White River in the vicinity of Petitioner's hydroelectric facility is over 3 times steeper than any other river which has been held to be navigable by this or any other court. While this Court and others have been willing to uphold findings of navigability where the river gradient reflects a drop of between 3 and 4 feet per mile, *see, e.g., United States* v. *Appalachian Electric Power Co.,* 311 U.S. at 412-13; and

[6] If this seems too extreme a statement, evidence was received that a creek whose flow could be contained by a six-inch pipe was also capable of the kind of shingle bolt driving which required dragging and handling. (*Supra* at 8.)

Montana Power Co. v. *FPC*, 185 F.2d 491 (1950), *cert. denied*, 340 U.S. 947 (1951), no court has been willing to uphold such a finding where the river in question like the White River had a uniform gradient in excess of 10 feet per mile. For example, the Second Circuit, in concluding that the Federal Power Commission had not established the presence of "navigability" with regard to a portion of the Genesee River on which a hydroelectric project of the Rochester Gas & Electric Corporation was located, emphasized that:

> It is noteworthy, also, that the gradient of the Genesee River in the twenty-one miles on either side of Mount Morris averages 10.5 feet per mile, which is considerably steeper than were the applicable slopes in the other court cases principally relied on by the Commission.

Rochester Gas & Electric Corp. v. *FPC*, 344 F.2d 594, 599 (2d Cir.), *cert. denied*, 382 U.S. 832 (footnote omitted). In this case, the drop in the White River averages 32 feet per mile, more than three times the drop of the Genesee.

In addition, the White River's low average annual flow renders it even less suitable for navigation. In *Rochester Gas & Electric Corp.* v. *FPC, supra* at 598-99, for example, the Second Circuit found the Genesee River's average annual flow of 1,600 cfs only marginal for supporting commerce. The White River's average annual flow of 1,400 cfs is 200 cfs less than the flow questioned by the court in *Rochester Gas & Electric Corp.* v. *FPC, supra*. The combination of unusual steepness and low flow render the White River unsuitable for navigation under any practical test.

Three other physical factors substantially exacerbate the unsuitability of the White River for navigation. First, the river is full of forest debris, gravel and sediment. Second, it is subject to periodic freshets which cause this forest debris to jam up, diverting the flow. (R. 1858, 1978.) Third, widely varying glacial melt significantly affects the stream flow:

> The river is a glacial stream, subject to material variation during each summer day on account of the glacial tide. A chart showing the flow is in the record. From this chart it appears that it is not an unusual thing for the flow to

> increase or diminish nearly one hundred per cent within a day or two. *The result of this intermittent flow is that the bolts are lodged all over the bed of the river, which, on account of numerous past floods and erosions, averages nearly one hundred feet, and requires constant handling to keep them in the drive.*

Sumner Lumber Co. v. *Pacific Coast Power Co., supra* at 634-35 (emphasis added).[7]

No river with similarly adverse physical characteristics has been held navigable by any federal court. If the Commission and the Court of Appeals had applied the Supreme Court's practical approach when considering the White River's navigability, they could only have concluded, on the basis of its physical characteristics alone, that the White River is not a "navigable water of the United States."[8]

(ii) The Use to Which the White River Has Been Put Does Not Qualify the River as a Navigable Water of the United States

Unlike the Commission or the Court of Appeals in this case, the Supreme Court has only found rivers to be navigable where their use could be considered to have a *substantial* impact upon interstate commerce. Applying that test of navigability in *The Daniel Ball,* the Court found the Grand

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[7] Although the bed is wide, the stream flow itself is small and meanders over the bed.

[8] In addition to the Administrative Law Judge who heard the case, the United States Corps of Engineers and the United States Coast Guard, both of which are charged with the responsibility of requiring permits for structures and facilities (other than hydroelectric projects) over, upon or in navigable waters of the United States, do not consider the White River to be navigable now nor have they ever considered it to be navigable. The Chief of the Water Control Section of the Seattle District Office of the Corps of Engineers testified that, regarding the issuance of permits under the Rivers and Harbors Act of 1899, neither the Corps of Engineers nor the Coast Guard required such permits for the White River. The reason for not requiring such permits is that these government agencies do not consider this river to be a navigable water of the United States. (R. 67.) These agencies have been recognized as "navigation experts" in other cases (*Georgia Power Co.* v. *FPC,* 152 F.2d 908, 911 (5th Cir. 1946); *Oklahoma* v. *Texas,* 258 U.S. 574 (1922); and *United States* v. *Appalachian Electric Power Co., supra* at 418) and their opinions should not have been ignored by the Court of Appeals.

River to be navigable only after it was shown that "the stream [was] capable of bearing a steamer of one hundred and twenty-three tons burden, laden with merchandise and passengers, as far as Grand Rapids, a distance of forty miles from its mouth in Lake Michigan." 77 U.S. at 564. Similarly, the Court held the Fox River to be navigable in *The Montello* only after it was shown that it formed a part of an interstate waterway linking the Mississippi, the Great Lakes and the Saint Lawrence and that it was used by vessels of 70 to 100 feet in length for the transport of fur and lead for over 100 years.

In this case, however, the only evidence relied on were instances of shingle bolt driving and dragging using the efforts of teams of horses and involving trespassing on private property to do so. Those cases finding navigation on the basis of actual *floatation* of timber are all founded on evidence of long, regular, and commercially successful use of rivers for the transportation of 70 to 100 feet long saw logs in interstate commerce. The instant case represents a major leap beyond the log floating test (which has been the absolute minimum allowed in the past for navigability), and a major expansion of federal jurisdiction. None of the previous opinions has held that a stream which cannot even readily accommodate small pieces of wood without constant handling could be considered navigable. *See, e.g., Connecticut Light & Power Co.* v. *FPC*, 557 F.2d 349, 356 (2d Cir. 1977); *Wisconsin* v. *FPC*, 214 F.2d 334 (7th Cir.), *cert. denied*, 348 U.S. 883 (1954); *Wisconsin Public Service Corp.* v. *FPC*, 147 F.2d 743, 748 (7th Cir.), *cert. denied*, 325 U.S. 880 (1945) (the Court observed that one operator floated 40 million board feet of pine logs down the river, and that the logs went to points outside of Wisconsin. Further, the logs were accompanied by large boats which carried personnel and cooking facilities).

In this case, there is no dispute that the relevant stretch of the river was *not* capable of floating anything near the size of saw logs (R. at 208, 514; Ex. 7) and even the Ninth Circuit concluded that these small shingle bolts "required nearly constant handling by the drivers to break up jams, [and to] free those bolts that were lodged on the banks and shallow

areas." 644 F.2d at 788. In addition, horses often dragged the bolts over the gravel of the bed, making it immaterial whether the channels were wet or dry.

Instead of supporting a classification of navigability, this evidence serves as a strong demonstration of the *lack* of capability of this stream to support any type of commerce in the way required by past case law. The Administrative Law Judge and the Washington State Supreme Court both considered the drives "marginal" even with the extraordinary use of teams of horses and men constantly handling the bolts. 13 Fed. Power Serv. at 5-361 (Appendix B at 12b) (R. 1442.)

In sum, the physical characteristics and historical use of the relevant portion of the White River do not come close to meeting the practical requirements set forth by the Supreme Court for demonstrating navigation.

e. This Expansion of the Term, "Navigability," Will Unconstitutionally Deprive the States and their Citizens of Rights Reserved to Them Under the Tenth Amendment

(i) The Impact on the Powers and Rights of the States

With the substantial reduction in the showing necessary to establish a river's navigability that has occurred in this case, the states will lose their authority to regulate the activities on virtually every creek and stream within their borders.

Under this new test for establishing navigability, no state will be able to oppose the federal government when the latter wishes to conduct activities on the rivers and streams within the state's borders, regardless of whether those activities would contravene the state's laws or otherwise be harmful to the welfare of its inhabitants. In *Arizona* v. *California,* 283 U.S. 423 (1931), for example, the State of Arizona attempted to stop the United States from constructing a dam on the Colorado River in violation of Arizona state law. The Court acknowledged the inconsistency of the dam with the state statutes, but held that, in light of the Colorado River's navigability, the federal

government had the right to create the challenged obstruction for the purpose of improving navigation. Similarly, the State of Oklahoma was unable to stop the federal government from constructing a reservoir on the Red River between Texas and Oklahoma even though construction of the project would cause Oklahoma significant injury, including the inundation of 100,000 acres of Oklahoma territory which were inhabited by 8,000 Oklahoma citizens and used for school purposes, a prison farm, highways, rights of way and bridges. *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U.S. 508 (1941).

This displacement of state authority by the federal government violates the Commerce Clause and the Tenth Amendment and should be corrected by the Court. Like Congress' attempt to impose the minimum wage and maximum hour provisions of the Fair Labor Standards Act to state employees in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), the federal government's intrusion into the states' regulatory power over the small streams within their borders constitutes an assault on the states' sovereignty. As the Court noted in *National League*, the federal government should not be permitted "[to] devour the essentials of state sovereignty," 426 U.S. at 855, through the unconstitutional use of its commerce power.[9]

(ii) The Impact on the Powers and Rights of Individuals

By asserting jurisdiction over those bodies of water with no or only a minimal impact on interstate commerce, the federal government will also displace rights of individuals who own property along or on those bodies of water. This displacement of individual power and rights violates the Commerce Clause and that portion of the Tenth Amendment which reserves those powers not conferred on the federal government by the Constitution "to the people."

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[9] In *U. S.* v. *Appalachian Electric Power Co.*, 311 U. S. 377 (1940), 41 state attorneys general filed an amicus curiae brief which protested the extension of navigation based jurisdiction on the grounds that "the states thus lose control of their resources and property is withdrawn from taxation in violation of the Tenth Amendment." 311 U. S. at 421-22. The river there was found to be navigable, but amici demonstrated the constitutional significance of such determinations.

If the Commission's determination that the White River is navigable is allowed to stand, the Commission will be able to require Petitioner and all similarly situated individuals to forfeit the projects they have constructed and maintained with their own funds on rivers formerly considered nonnavigable. This result is a consequence of the Commission's policy of giving states and municipalities a preference in taking over any project when the license expires. The state or municipality must pay only the original cost of the project less the amount of accumulated depreciation, which often is next to nothing. The concept is called "net investment" and it is unrelated to fair market value:

> That concept refers essentially to the cost of the project, reduced by the recovery of that cost through earnings (principally in the form of accumulated depreciation) in excess of a fair return, during the term of the previous license period. That price could range from zero, to a substantial part of the cost of construction or acquisition many years ago when price levels were much lower than today, and would be considerably less than the cost of building or otherwise acquiring new generating capacity today.

City of Bountiful, Utah, Utah Power & Light Co., City of Santa Clara, California, Pacific Gas & Electric Co., Docket No. EL78-43, Op. No. 88, "Opinion and Order Declaring Municipal Preference Applicable to Hydroelectric Relicensing," [April-June, 1980 transfer binder] 11 FERC (CCH), ¶ 61, 337 (June 27, 1980).[10]

In this case, allowing a state or municipality to "purchase" Petitioner's White River hydroelectric facility for the cost of its construction in 1911 minus the amount of accumulated depreciation is tantamount to forcing Petitioner to give it to the state or municipality for free; and all individuals throughout the United States owning projects constructed prior to 1935 on rivers previously considered nonnavigable will face a similar

[10] The Commission thus recognizes that under the original cost method of calculation, prices were much lower a few years ago and cannot be matched today. For a project built in 1911, the original cost is substantially less than fair market value.

prospect of forfeiture. In short, if the Commission's new and expansive approach to navigability is not checked by the Court, Petitioner and all other similarly situated utilities and licensees will eventually have to give their hydroelectric facilities away.

The reduction in the showing necessary to establish a stream's navigability by the FERC in this case will also dramatically affect the usufructuary rights of individuals owning property adjoining small streams and creeks. Under the well-established rule that the bed and banks of the "navigable waters of the United States" vested in the states as of their respective dates of formation, these landowners will lose their property rights in the bed and banks of these small streams if the definition of navigability is expanded to the point now urged by the Commission. *See, e.g., Montana* v. *United States*, 49 U.S.L.W. 4296 (March 24, 1981); and *United States* v. *Oregon*, 295 U.S. 1, 26 (1935).

Furthermore, anyone with structures along or over these small streams may be forced by the federal government to remove them or change them without compensation by the federal government under the "federal navigational servitude," a corollary to a determination of navigability. *See, e.g., Greenleaf-Johnson Lumber Co.* v. *Garrison*, 237 U.S. 251, 262 (1915) (riparian owners who had erected waterfront wharves had no right to compensation when the federal government ordered demolition of part of the structures); *Monongahela Bridge Co.* v. *United States*, 216 U.S. 177, 193-94 (1910) (federal government had no obligation to pay compensation to bridge owner who had been ordered to alter the height of a bridge so as not to obstruct navigation over navigable river of United States); and *United States* v. *Wauna Toll Bridge Co.*, 130 F.2d 855, 856-57 (9th Cir. 1942) (bridge company ordered to alter bridge over navigable water at its own expense).

2. The Court of Appeals Did Not Apply the Jurisidictional Fact Doctrine

The second reason for granting review is that this case presents the Court with the opportunity for resolving the conflict between the circuits on the proper interpretation of the constitutional and jurisdictional fact doctrine of *Crowell* v. *Benson*, 285 U.S. 22 (1932).

a. The Jurisdictional Fact of *Crowell* v. *Benson*

In *Crowell* v. *Benson*, the Supreme Court held that a federal agency's determination of a fact necessary to establish its own jurisdiction cannot be accorded the same degree of finality placed upon the agency's ordinary factual determinations. Reasoning that it is the function of the reviewing courts to determine whether the administrative agencies have exceeded their jurisdiction, the Supreme Court established the constitutional and jurisdictional fact doctrine under which the federal courts before whom the decisions of federal agencies are brought for review are required to make de novo determinations of the basic facts necessary to establish the individual agency's jurisdiction:

> A different question is presented where the determinations of fact are fundamental or "jurisdictional," in the sense that their existence is a condition precedent to the operation of the statutory scheme. These fundamental requirements are that the injury occur upon the navigable waters of the United States and that the relation of master and servant exists. . . . In relation to these basic facts, the question is not the ordinary one as to the propriety of provision for administrative determinations. . . . It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency . . . for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. . . . That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a

> government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law.

285 U.S. at 54-57 (footnotes omitted).

b. The Split Among the Circuits on the Jurisdictional Fact Doctrine

There currently exists a conflict among the decisions of the Supreme Court and those of the lower federal courts regarding the vitality of this doctrine. In the years immediately following the decision in *Crowell* v. *Benson*, the Supreme Court repeatedly cited *Crowell* approvingly for the proposition that a de novo trial is required whenever a federal agency has decided a question of constitutional significance. *See, e.g., Shields* v. *Utah Idaho Central R.R.*, 305 U.S. 177, 184 (1938); *Baltimore & O.R.R.* v. *United States*, 298 U.S. 349, 368 (1936). In fact, the Supreme Court applied a jurisdictional fact analysis and made its own de novo determination of whether a river was a "navigable water of the United States" in a 1940 case involving the predecessor of the act under which the Commission now claims jurisdiction over the White River. *United States* v. *Appalachian Electric Power Co., supra.*[11]

But in subsequent years the vitality of the doctrine was eroded by a number of Supreme Court decisions which failed to require the lower federal courts to apply the de novo standard when reviewing determinations of jurisdictional facts by federal agencies. For example, instead of requiring the lower federal courts to make independent determinations of jurisdictional

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[11] Petitioner's Reply Brief to the Ninth Circuit stated at 28-29:

> "The Supreme Court in *Appalachian Electric Power Co., supra* at 403-04 recognized the peculiar nature of the issue of navigability and undertook to make findings *anew* on navigability after the issue had been considered by two lower courts:
>
> "In cases involving the navigability of watercourses, this Court, without expressly passing on the finality of the findings, on some occasions has entered into consideration of the facts found by two courts to determine for itself whether the courts have correctly applied to the facts found the proper legal test. When we deal with issues such as these before us, facts and their constitutional significance are too closely connected to make the two-court rule a serviceable guide."

facts, the Supreme Court in *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 469, 473-74 (1946), and *Davis* v. *Department of Labor & Industries*, 317 U.S. 249, 256-57 (1942), held that a federal agency's findings regarding its own jurisdiction should be rejected only where there has been an apparent error. Similarly, in *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944), the Court held that the National Labor Relations Board's finding that an employment relationship existed was to be given the same degree of conclusiveness as any other finding of fact by the Board, even though the Board's jurisdiction depended upon its determination that the employer-employee relationship existed. These decisions prompted Justice Frankfurter to remark in 1946 that *Crowell* v. *Benson* had earned a "deserved repose" and was therefore no longer law. *Estep* v. *United States*, 327 U.S. 114, 142 (1946).

Instead of disregarding the constitutional and jurisdictional fact doctrine altogether, however, the Supreme Court has more recently indicated that the doctrine of *Crowell* v. *Benson* still contains merit. Just last term, for example, seven Supreme Court justices discussed the constitutional and jurisdictional fact doctrine of *Crowell* v. *Benson* without intimating in the slightest that *Crowell* was no longer good law. *United States* v. *Raddatz*, 447 U.S. 667(1980). Chief Justice Burger, in an opinion joined by Justices White, Blackmun, Rehnquist and Stevens, quoted *Crowell* v. *Benson* for the proposition that "the enforcement of constitutional rights requires that the federal courts should determine such an issue upon its own record and the facts elicited before it." 447 U.S. at 682. Similarly, Justice Marshall, dissenting with Justice Brennan, noted that *Crowell* v. *Benson* has never been overruled, and that it has been cited by the Supreme Court "with approval in recent years." 447 U.S. at 710. Among those cases in which *Crowell* v. *Benson* has been recently cited with approval are *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 102 (1973) (Brennan, J., dissenting), *Ortwein* v. *Schwab*, 410 U.S. 656, 666 (1973) (Marshall, J., dissenting), and *Jacobellis* v. *Ohio*, 378 U.S. 184, 190 n.6 (1964).

The different approaches which the Supreme Court has taken toward the "constitutional and jurisdictional fact" doctrine since it was first articulated in *Crowell* v. *Benson* have

resulted in a split of authority among the lower federal courts. The Federal Courts of Appeals for the Ninth, Sixth and Fifth Circuits have adopted the position that they are not required to make de novo determinations of constitutional and jurisdictional facts decided by federal agencies. These courts have instead concluded that an agency's determination of a constitutional or jurisdictional fact, like its determination of any other fact, should be affirmed if supported by substantial evidence or if there has been no "apparent error." *See, e.g., Morrison-Knudsen Co.* v. *O'Leary,* 288 F.2d 542, 543-44 (9th Cir.), *cert. denied,* 368 U.S. 817 (1961); *N.A. Woodworth Co.* v. *Kavanagh,* 202 F.2d 154 (6th Cir. 1953); *Associated Indemnity Corp.* v. *Shea,* 455 F.2d 913, 914-15 n.2 (5th Cir. 1972).

The Federal Courts of Appeals for the First, Fourth, Seventh and Eighth Circuits, however, have not abandoned the de novo requirement of the "jurisdictional and constitutional" fact doctrine and continue to cite *Crowell* v. *Benson. See e.g., Von Clemm* v. *Banuelos,* 498 F.2d 163, 167 (1st Cir.) *cert. denied,* 419 U.S. 1079 (1974); *Brown-Pacific-Maxon Company* v. *Toner,* 255 F.2d 611, 615-16 (7th Cir. 1958); *Pittsburgh Steamship Co.* v. *Brown,* 171 F.2d 175, 177-78 (7th Cir. 1948); *United States* v. *Appalachian Electric Power Co.,* 107 F.2d 769, 791 (4th Cir. 1939), *rev'd on other grounds,* 311 U.S. 377 (1940); *Wood Towing Corp.* v. *Parker, 76 F.2d 770,772 (4th Cir. 1935); Bassett* v. *Massman Const. Co.,* 120 F.2d 230, 233 (8th Cir.), *cert denied,* 314 U.S. 648 (1941)). For example, the Seventh Circuit followed *Crowell* v. *Benson* in *Pittsburgh Steamship Co.* v. *Brown* after describing the controversy surrounding the holding in *Crowell* follows:

> The rulings of the District Court are based almost entirely upon the decision of the Supreme Court in *Crowell* v. *Benson,* 285 U.S. 22, 52, S.Ct. 285, 76 L.Ed. 598, which leaves no room for argument but that plaintiff was entitled to a trial de novo on the issue as to whether the injury occurred upon the navigable waters of the United States....

In an effort to persuade us that this decision should not be followed, numerous law review articles and text book authorities are cited which have criticized the opinion. We need not go so far afield, however, to find criticism of the opinion because it was severely criticized at the time it was rendered in a dissenting opinion joined in by three members of the court. In our view, this criticism furnishes no justification for a refusal either on the part of this court or the lower court to follow it. Numerous cases are cited in support of the contention that the *Crowell* case no longer retains its vitality, the most important of which are *Davis* v. *Department of Labor*, 317 U.S. 249, 63 S.Ct. 225, 87 L.Ed. 246, and *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 469, 67 S.Ct. 801. A study on these cases, however, makes it plain that neither of the constitutional jurisdictional questions which the court considered in the *Crowell* case was involved. None of the cases relied upon by the defendants in this respect, including the two just referred to, furnish any substantial basis for the contention that the *Crowell* case is no longer binding upon inferior federal courts.

On the other hand, the *Crowell* case has been cited by the Supreme Court with approval. *Shields* v. *Utah Idaho Central R. Co.*, 305 U.S.177, 184, 59 S.Ct. 160, 83 L.Ed. 111; *Baltimore & O.R. Co., et al* v. *United States, et al.* 298 U.S. 349, 368, 56 S.Ct. 797, 80 L.Ed. 1209; *Borax, Ltd.* v. *Los Angeles*, 296 U.S. 10, 18, 56 S.Ct. 23, 80 L.Ed. 9. And it has been frequently followed by lower courts, including this court in *South Chicago Coal & Dock Co.* v. *Bassett*, 7 Cir., 104 F.2d 522, 523-525, which was affirmed by the Supreme Court, 309 U.S. 251, 60 S.Ct. 544, 84 L.Ed. 732. See also *Bassett, Deputy Commissioner* v. *Massman Const. Co.*, 8 Cir. 120 F.2d 230, 233; *Wood Towing Co.* v. *Parker* 4 Cir., 76 F.2d 770, 772.

In our view, it is hardly open to question but that the court below correctly held that plaintiff was entitled to a trial de novo on the issue presented by its complaint for

> injunction, and such a trial contemplates what the term implies, a trial anew of the entire controversy, including the hearing of evidence, as though no previous action had been taken. 171 F.2d at 177-78.

In sum, a conflict exists between the Federal Courts of Appeals for the Ninth, Sixth and Fifth Circuits and those of the First, Fourth, Seventh and Eighth Circuits regarding the standard of review to be applied whenever a federal agency's determination of a constitutional or jurisdictional fact has been brought to a federal court for review.

c. The Jurisdictional Fact Doctrine Should Have Been Applied in this Case

The Ninth Circuit, adhering to its rejection of the jurisdictional fact doctrine of *Crowell* v. *Benson*, reviewed the Commission's determination of the White River's navigability under the limited "substantial evidence" standard even though the determination of navigability was made only to establish that the Commission had jurisdiction:

> The only remaining question is whether the Commission's finding of navigability is supported by substantial evidence. The Commission's finding as to the fact of navigability, if supported by substantial evidence, is conclusive. 16 U.S.C. § 8251(b); *Conn. Light & Power Co.* v. *Federal Power Commission* 557 F.2d 349, 354 (2d Cir. 1977); *Rochester, supra*, 344 F.2d at 596.

644 F.2d at 787. If *Crowell* v. *Benson* is no longer good law, then the Ninth Circuit was correct in applying the "substantial evidence" standard of review. But if the constitutional and jurisdictional fact doctrine of *Crowell* v. *Benson* still applies to cases such as this, as the more recent decisions of this Court and the decisions of the First, Fourth, Seventh and Eighth Circuits indicate, the Ninth Circuit committed an error of law which can only be corrected by this Court's acceptance of this case for review, its reversal of the Ninth Circuit's decision, and its affirmance of the continuing vitality of the constitutional and jurisdictional fact doctrine of *Crowell* v. *Benson*.

The parallels between the facts of this case and those of *Crowell* v. *Benson* indicate that the Court will not be presented with a case more appropriate for resolving the conflicting interpretations of the constitutional and jurisdictional fact doctrine than this one. In *Crowell* v. *Benson*, an employer sought to enjoin an award made by the United States Employees' Compensation Commission which required an employer to pay a worker compensation under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. §§ 901-950). The district court held that in order for the Longshoremen's and Harbor Workers' Compensation Act to be constitutional, a trial de novo must be had on the question whether the worker had been employed by the alleged employer. The Supreme Court affirmed, holding that for purposes of the Longshoremen's and Harbor Workers' Compensation Act, the questions whether the employment relationship existed *and whether the injury occurred on a navigable water of the United States were issues affecting the jurisdiction of the United States Employees' Compensation Commission and therefore of constitutional signficance; and that a de novo hearing on these jurisdictional questions was required* in the federal courts to whom appeals from that agency's determinations were brought.

Like that of the Commission in *Crowell* v. *Benson*, the jurisdiction of the Commission here also depends solely upon its determination that the White River is "navigable." Nevertheless, the Ninth Circuit disregarded *Crowell* v. *Benson*'s requirement of a de novo hearing on navigability in this case and instead reviewed the determination of the Commission under the substantial evidence test. The Ninth Circuit adopted this standard of review on the basis of two cases in which the Second Circuit failed to acknowledge that the jurisdictional fact doctrine governed the standard of review and the following language from the Federal Power Act: "The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." 16 U.S.C. § 8251(b). This provision for review under the "substantial evidence" standard can only be constitutional, however, in light of *Crowell* v. *Benson*, if interpreted as applying solely to the Commission's *ordinary* factual determinations and not to those determinations

of facts bearing on the validity of the Commission's own jurisdiction. Consequently, the Ninth Circuit should not have relied on this provision of the Federal Power Act for authority to review a determination of constitutional significance under a limited substantial evidence standard.[12]

De novo review is especially warranted in this type of case. The Commission's "factual finding" of past navigability was for the sole purpose of establishing its jurisdiction—in order to reach other objectives unrelated to navigation. Without such a finding it has no jurisdiction over Petitioner. At the same time it is clear the Commission has no regulatory interest here in navigation; the Commission itself concedes it can do nothing to improve navigation. In other words, the Commission's "finding" of past navigability is a bootstrap argument to allow it to expand its jurisdiction over power facilities not otherwise subject to Commission jurisdiction. Navigation was an excuse for jurisdiction, not a reason for it. When the jurisdictional findings of the Commission are divorced from the purposes for which it intends to exercise its powers, the courts cannot give any special weight to such findings.

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[12] The Ninth Circuit's tendency not to apply a de novo standard of review whenever constitutional facts have been decided by federal agencies is evidenced by this Court's reversal of the Ninth Circuit's decision in *Agosto* v. *Immigration & Naturalization Service*, 436 U.S. 748 (1978). The question there was whether a victim of a deportation order had made a sufficient showing in support of his claim to United States citizenship to entitle him to a de novo judicial determination of that claim under Section 106(a)(5)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1105(a)(5)(B). Section 106(a)(5)(B) of the Immigation and Nationality Act provides that whenever a petitioner seeks review of a deportation order and makes a showing that his claim that he should be made a United States citizen is not frivolous, the Court of Appeals, if it finds that "a genuine issue of material fact as to the petitioner's nationality is presented," must transfer the proceedings to the district court for a hearing de novo of the nationality claim. Instead of simply requiring the petitioner to demonstrate that his claim was not frivolous and that an issue of fact concerning his nationality was present, however, the Ninth Circuit held that in order to obtain a de novo hearing the petitioner had to present "substantial evidence" in support of his citizenship claim. Finding that he failed to present such substantial evidence, the Ninth Circuit refused to grant the petitioner a de novo hearing in district court. 549 F.2d 806. The Supreme Court reversed, holding that the Ninth Circuit erred by denying the petitioner his right to a de novo review of his deportation order.

In contrast to the Commission, the United States Corps of Engineers has long maintained (since the Rivers and Harbors Act of 1899) that the White River is *not* navigable, a fact which the Court of Appeals chose not to even mention in its opinion. The Corps has a bona fide interest in navigation in its day-to-day activities; it would not seek to define a river as navigable unless there were some purposes necessarily related to navigation which it could advance.

In sum, the Ninth Circuit should have made a de novo determination of whether the White River was navigable instead of allowing the Commission to expand its jurisdiction without the supervision required by the Supreme Court in *Crowell* v. *Benson.*

CONCLUSION

For the reasons set forth above, this petition for writ of certiorari should be granted.

Respectfully submitted,

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Appendix

81-235

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No. 81-

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

PUGET SOUND POWER & LIGHT COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

and

WASHINGTON STATE DEPARTMENT OF FISHERIES, WASHINGTON STATE DEPARTMENT OF GAME, MUCKLESHOOT INDIAN TRIBE, AND SECRETARY OF THE INTERIOR,
Intervenors.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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No. 78-3211

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

PUGET SOUND POWER & LIGHT COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

and

Washington State Department of Fisheries, Washington State Department of Game, Muckleshoot Indian Tribe, and Secretary of the Interior,
Intervenors.

ARGUED AND SUBMITTED NOV. 5, 1980.
DECIDED MAY 4, 1981.

Appendix A

STEVEN C. MARSHALL, Perkins, Coie, Stone, Olsen & Williams, Seattle, Wash., argued for petitioner; DOUGLAS P. BEIGHLE, Seattle, Wash., on brief.

DONALD B. MILLER, Boulder, Colo. argued for respondent; MCNEIL WATKINS II, Washington, D.C., on brief.

ON PETITION TO REVIEW ORDERS OF THE FEDERAL ENERGY REGULATORY COMMISSION.

Before VAN DUSEN,* ANDERSON and BOOCHEVER, Circuit Judges.

J. BLAINE ANDERSON, Circuit Judge:

We have before us a petition for review filed by Puget Sound Power & Light Company (Puget) challenging an order entered by the Federal Energy Regulatory Commission (Commission)[1] directing Puget to refile its application for a license to operate its hydroelectric generating project, located on the White River in the State of Washington. The Commission reversed the findings of the Administrative Law Judge (ALJ)[2] and determined that Puget's White River Project is located on "navigable waters," as that term is defined by section 3(8) of the Federal Power Act, 16 U.S.C. § 796(8), thus conferring licensing jurisdiction upon the Commission in accordance with sections 4(e) and 23(b) of the Act, 16 U.S.C. §§ 797(e), 817. Jurisdiction is conferred upon this court by section 313(b) of the Act, 16 U.S.C. § 825(b), and we now affirm.

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* The Honorable Francis L. Van Dusen, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

[1] On October 1, 1977, the Federal Power Commission was replaced by the Federal Energy Regulatory Commission pursuant to the provisions of the Department of Energy Organization Act, 42 U.S.C. §§ 7101, *et seq.*, and Executive Order No. 12009, 42 Fed.Reg. 46267 (September 15, 1977). Many of the FPC's regulatory responsibilities under the Federal Power Act, including all those relevant to this case, were transferred to the FERC.

[2] The ALJ's opinion appears at 13 Fed.Power Serv. 5-352 (decided March 3, 1976). The FERC's opinion and order is reported at 13 Fed.Power Serv. 5-332 (issued October 28, 1977), and its opinion and order denying rehearing can be found at 15 Fed.Power Serv. 5-1069 (issued August 9, 1978).

Puget does not contend that the Commission applied an erroneous test for determining the White River's navigability. Section 3(8) of the Federal Power Act defines "navigable waters" as:

> "... those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority."

16 U.S.C. § 796(8). This definition parallels the language of the cases that declare the authority of the United States, arising from the commerce clause of the Constitution, over its waters which are capable of use as interstate highways. See *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 61 S.Ct. 291, 85 L.Ed. 243 (1940); *United States* v. *Utah*, 283 U.S. 64, 51 S.Ct. 438, 75 L.Ed. 844 (1931); *Economy Light & Power Co.* v. *United States*, 256 U.S. 113, 41 S.Ct. 409, 65 L.Ed. 847 (1921); *The Montello*, 20 Wall 430, 87 U.S. 430, 22 L.Ed. 391 (1874); *The Daniel Ball*, 10 Wall 557, 77 U.S. 557, 19 L.Ed. 999 (1871).

[1,2] In this case, no evidence was offered to establish either that the relevant stretch of the White River is presently navigable, or that it could be made navigable through reasonable improvements. *Appalachian*, *supra*, 311 U.S. at 407, 61 S.Ct. at 299. Rather, all of the evidence concerned the historic use of the river prior to the time when the hydroelectric project commenced operations in 1911, and thus began diverting a substantial portion of the river's flow. This approach is not fatal to a determination of navigability for "when once found to be navigable, a waterway remains so." *Id.* at 408, 61 S.Ct. at

299. We are satisfied that both the ALJ and the Commission applied the proper test: To find navigability, the evidence must establish that in the past the White River was either used, or was susceptible of being used, in its natural and ordinary condition as a highway for useful commerce. *See Rochester Gas and Electric Corp.* v. *Federal Power Commission*, 344 F.2d 594, 596 (2d Cir.), *cert denied*, 382 U.S. 832, 86 S.Ct. 72, 15 L.Ed.2d 75 (1965). If the waterway is merely capable of exceptional transportation during periods of high water, it is not navigable. "The mere fact that logs, poles, and rafts are floated down a stream occasionally and in times of high water does not make it a navigable river." *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 698, 19 S.Ct. 770, 773, 43 L.Ed. 1136 (1899).

The only remaining question is whether the Commission's finding of navigability is supported by substantial evidence. The Commission's finding as to the fact of navigability, if supported by substantial evidence, is conclusive. 16 U.S.C. § 825*l*(b); *Conn. Light & Power Co*, v. *Federal Power Commission*, 557 F.2d 349, 354 (2d Cir. 1977); *Rochester, supra*, 344 F.2d at 596. Puget raises various challenges to the sufficiency of the evidence in this case. We think they must be rejected.

[3] In 1913, the Washington Supreme Court decided that the White River was not navigable. *Sumner Lumber & Shingle Co.* v. *Pacific Coast Power Co.*, 72 Wash. 631, 131 P. 220 (1913). In that case, Sumner Lumber & Shingle Company brought suit against the Pacific Coast Power Company, Puget's predecessor in interest. The lumber company, which operated a shingle mill downstream from the subject power plant, sought to enjoin the power company's diversion from the White River so as to protect its avenue of getting shingle bolts[3] from up in the wooded mountains downstream to its mill. The company alleged that without the injunction, "its business as a booming company" would be destroyed. *Id.* at 222. The court ruled against the lumber company and held that the White River was not navigable at the precise location now under consideration in this case. Puget argues that the Commission failed to give

[3] A shingle bolt is a quartered section of a log, normally cedar, and is about four feet six inches in length. They are used for making shingles.

sufficient weight to the Washington Supreme Court's assessment of the facts in the *Sumner Lumber* case. The ALJ concluded that, "Ignoring a local court's evaluation in 1913 of almost the same facts urged 70 years later borders on the absurd." ALJ's Opinion, 3 Fed.Power Serv. 5-352, at 5-360. Had the Washington Supreme Court applied the same test of navigability that the Commission was obligated to follow in this case, we would be inclined to agree. However, we are convinced that it did not, and a holding under state law is not determinative of navigability under Federal law. *Brewer-Elliot Oil & Gas Co.* v. *United States*, 260 U.S. 77, 87, 43 S.Ct. 60, 64, 67 L.Ed. 140 (1922); *Wisconsin* v. *Federal Power Commission*, 214 F.2d 334, 336-337 (7th Cir.) *cert. denied*, 348 U.S. 883, 75 S.Ct. 124, 99 L.Ed. 694(1954).

[4] While the holding in *Sumner Lumber* is of little consequence to the immediate action, the Commission found that the record from that case provided valuable evidence of the historic use of the White River for the flotation of shingle bolts. In their brief to the Commission, the Muckleshoot Indian Tribe and the Secretary of Interior included an appendix containing portions of that record. Selected portions of the testimonies of ten witnesses and twelve duplicate photographs of a shingle bolt drive were included. Whatever objections Puget might have had concerning the consideration of this documentation were lost when it chose to provide the Commission with portions of the record favorable to its position. We think the Commission's consideration of this material was proper and Puget has not contended otherwise. See 16 U.S.C. § 825g(b); *Conn. Light and Power Co., supra*, 557 F.2d at 356; *Montana Power Co.* v. *Federal Power Commission*, 185 F.2d 491, 498 (D.C.Cir. 1950), *cert. denied*, 340 U.S. 947, 71 S.Ct. 532, 95 L.Ed. 683 (1951).

[5] On the evidence in the record before it, as augmented by portions of the record from the *Sumner Lumber* case, the Commission concluded that the White River was navigable. The basis for that decision was the historic use of the river prior to 1911. It was at that time that Puget's predecessor in interest began diverting a substantial portion of the river's flow. The

Commission found that the White River had supported navigation by light craft, primarily Indian canoes, and that shingle bolts had been transported downstream for more than twenty years. The shingle bolts were driven on the river at all times of the year *except* at times of high water during the annual freshets. The bolts required nearly constant handling by the drivers to break up jams, free those bolts that were lodged on the banks and shallow areas, and direct them down the main channel of the river. Yet, the drivers did not consider this work difficult, and there was testimony to the effect that it was the most, if not the only, economically feasible method at that time of transporting the bolts to the lumber mills. Our review of the record reveals that the Commission's findings are supported by the evidence.

Puget argues that the evidence of navigation by canoes is insubstantial and cannot establish navigability. Be that as it may, nevertheless, the evidence is relevant. The "personal or private use by boats" may demonstrate "the availability of the stream for the simpler types of commercial navigation." *Appalachian, supra,* 311 U.S. at 416, 61 S.Ct. at 303; *United States* v. *Utah, supra,* 283 U.S. at 82, 51 S.Ct. at 443. However, we are of the opinion that the river's navigable character must rest upon the evidence of the downstream flotation of shingle bolts. We therefore focus our attention of the evidence and arguments relating thereto.

Puget contends that finding navigability based on the flotation of wood the size of single bolts would drastically expand the existing law of navigability. The argument rests upon a misconception of the law. It is not the size of articles transported in commerce that establishes the navigable character of a waterway. Navigability depends upon the stream's usefulness as a transportation mechanism for commerce. "It is obvious that the uses to which the streams may be put vary from the carriage of ocean liners to the floating out of logs; that the density of traffic varies equally widely from the busy harbors of the seacoast to the sparsely settled regions of the Western mountains. The tests as to navigability must take these variations into consideration." *Appalachian, supra,* 311 U.S. at

405-406, 61 S.Ct. at 298. During the relevant period of Washington State's history, shingle bolts were as valuable a commodity as other timber products. The Washington Supreme Court so held:

> "... while a single shingle bolt contains but a small amount of timber compared with a saw log, yet in the aggregate timber in that form in this locality is relatively of equal commercial value with saw logs, and its carriage to market is perhaps as important to the timber industry of this state as that of saw logs. Elochoman creek was declared to be navigable for the reason that it furnishes a natural highway for the product of the great logging industry in this state, and Wood's creek should also be held to be navigable because it furnishes a similar highway for the product of another branch of the same industry... The reasons leading to the holding in this state, and others where the timber industry is important, that streams which are navigable in fact for the floatage of timber to market shall be public highways for that purpose, are founded upon commercial convenience and necessity because of the environment of the industry."

Monroe Mill Co. v. *Menzel*, 35 Wash. 487, 77 P. 813, 815 (1904). Clearly, shingle-bolt driving was a commercial use of the White River in the constitutional sense.

Shingle bolts were not driven on the White River without difficulty. Nor was the use of the river extensive, or long and continuous. These conditions do not preclude navigability. The language in two Supreme Court decisions is particularly fitting:

> "The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway... The vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful

> commerce. If this be so, the river is navigable in fact, although its navigation may be encompassed with difficulties by reason of natural barriers, such as rapids and sandbars."

The *Montello, supra,* 20 Wall at 441-443, 87 U.S. at 441-443.

> "[It is not] necessary for navigability that the use should be continuous. The character of the region, its products and the difficulties or dangers of the navigation influence the regularity and extent of the use. Small traffic compared to the available commerce of the region is sufficient. Even absence of use over long periods of years, because of changed conditions, the coming of the railroad or improved highways does not affect the navigability of rivers in the constitutional sense."

Appalachian, supra, 311 U.S. at 409-410, 61 S.Ct. at 300.

The evidence in this case is not overwhelming, but the Supreme Court has noted that, "Use of a stream long abandoned by water commerce is difficult to prove by abundant evidence." *Appalachian, supra,* 311 U.S. at 416, 61 S.Ct. at 303. In analyzing the quantum of evidence necessary to support a finding of navigability, we must take "due account of the changes and complexities in the circumstances of a river." *Id.* at 404, 61 S.Ct. at 297. In this case, the settlement of the region under consideration did not begin until the 1850's, the course of the river changed in 1906, and in 1911, Puget's predecessor in interest commenced operation of the power project. Two years later, the Washington Supreme Court rendered its decision in *Sumner Lumber, supra.* The change in the river's course and the commencement of operation of the power project effectively terminated shingle-bolt driving on the relevant stretch of the White River.

In short, we conclude that the Commission's determination of navigability is supported by substantial evidence. Accordingly, the decision and orders of the Commission are

AFFIRMED.

Appendix B

PRESIDING ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION FINDING NO JURISDICTION (March 3, 1976)

APPEARANCES

DOUGLAS P. BEIGHLE, WILLIAM S. WEAVER and JOHN C. MASON for Puget Sound Power and Light Company

JOSEPH L. CONIFF, JR., for Washington Department of Game and Washington Department of Fisheries

CHARLES E. O'CONNELL, JR., for The Secretary of the Interior on behalf of the Muckleshoot Indian Tribe

L. GRAEME BELL, III, THOMAS L. SMITHSON and ALEXANDRA HARMON for the Muckleshoot Indian Tribe

JOHN GOSSEL and LINDA L. LEE for the Staff of the Federal Power Commission

LITT, Presiding Administrative Law Judge:

I

PROCEDURAL BACKGROUND

By its order entered November 20, 1973, the Commission set for hearing the application of Puget Sound Power and Light Company (Puget) filed November 20, 1964, seeking either a disclaimer of jurisdiction or, in the alternative, for a license for its White River Project No. 2494. For 64 years Puget has steadfastly maintained that its project is not jurisdictional, but it filed its application in response to persistent Commission cajoling. Subsequent to its filing, the jurisdiction question appeared to be decided against Puget when the Supreme Court in *F.P.C. v. Union Electric Company*, 381 U.S. 90 (1965), also known as *Taum Sauk*, held that the Federal Power Commission has licensing authority over a project whose generated energy is transmitted in interstate commerce, even if the project is located

on a non-navigable stream. However, in *The Farmington River Power Company* v. *F.P.C.*, 455 F.2d 86 (2d Cir. 1972) the Second Circuit concluded that a project located on a non-navigable stream which generates energy transmitted in interstate commerce and which has undergone no post-1935 construction—such as this Project—does not fall within the 1935 amendment of Section 23(b) of the Federal Power Act. Based on this last court action, Puget filed, on January 15, 1973, an application for withdrawal of its licensing application. The original question of jurisdiction, as focused by the application for withdrawal, was set by the Commission for hearing.

Hearings were held in Seattle, Washington, on July 30 and 31, 1974, at which Puget, the Washington Departments of Game and Fisheries (Fisheries), the Secretary of the Interior, the Muckleshoot Indian Tribe,[1] and the Commission Staff participated. Initial and reply briefs were filed by each of the aforementioned parties.

II

GENERAL FACTS

Puget's White River Project is a hydroelectric generating facility located on the upper White River, in Pierce County, Washington (see map—Appendix A). The White River is a glacial stream fed by ice and snow on Mount Rainier. The project consists of a diversion facility at Buckley, Washington, which diverts a portion of the White River into a timber flume approximately 5,000 feet long, discharging in turn into a series of settling basins which cover approximately two miles. From the settling basins, the water enters an unlined canal and then a timber-lined canal until it enters Lake Tapps, approximately two miles distant. From Lake Tapps the water flows through a

[1] The "Muckleshoot Tribe" is a present-day tribal entity organized under the Indian Reorganization Act, 48 Stat. 988, 25 U.S.C. § 476 and 479. It is recognized by the United States as a currently-functioning Indian tribe maintaining tribal government on a reservation. The Tribe's present membership roll was approved by a representative of the Secretary of the Interior on December 15, 1969. The Tribe presently has approximately 386 members.

concrete-lined tunnel to six high-pressure penstocks which carry it to the power house at Dieringer, Washington. After passing through the turbine generator units in the power house, the water is returned to the White River through a half-mile long unlined tailrace channel.

The project design alters the flow of the river at a point approximately six miles upstream of the Muckleshoot Indian Reservation, and the diverting canals and flumes return the water to the natural course of the White River at a point four miles downstream of the reservation. This diverts water from a 16-mile segment of the river (between Buckley and the tailrace of the Dieringer Power Plant).

At the time of its construction in 1911 the project consisted of two turbine generator units with a name-plate rating of 15,000 kilowatts each. A third generator with a 16,000 kilowatt rating was added in 1918 and a fourth similarly-sized unit was installed in 1924. The basic design of the project has not changed since the fourth generating unit was installed in 1924; the rewinding of units three and four in the 1950's, while altering the name-plate ratings, did not alter the electro-magnetic characteristics of the generators. All parties agree that the construction and horsepower of the turbines and the general hydraulic design of the facility are the same as they were at the time the last unit was added in 1924.

III

APPLICABLE STATUTES

The following is a precis of those sections of the Federal Power Act (the Act) and the Federal Water Power Act (1920 Act) pertinent to this proceeding.

Section 3(8)—Defines the term "navigable waters" so as to include bodies of water over which Congress has jurisdiction through its commerce powers.[1]

Section 3(2)—Defines the word "reservation" so as to include Indian reservations and land interests owned by the Government.

Section 4(e)—Authorizes the Commission to issue licenses for project works (a) on water over which Congress has commerce power jurisdiction (but see note 1 on p. 3, *supra*); (b) on public lands or reservations, or (c) where the project's purpose involves the utilization of surplus water from any Government dam.

Section 23(b)—Specifies that it is unlawful to operate a project on navigable waters, public lands or reservations or which utilizes surplus water from a Government dam without a license, unless such project was validly operating prior to the 1920 Act. Thus, pursuant to the Commission's investigation, any proposal which either affects commerce or public lands or reservations must be licensed by the Commission.

Section 4(d)—1920 Act—Empowers the Commission to issue licenses for project works necessary for development or improvement of navigation, located upon public lands or reservations or which utilize surplus water from Government dams. A license may not interfere with a reservation or be inconsistent with the reservation's purposes.

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[1] It cannot escape notice that the grant of authority to the Commission as to "navigable waters" is less than the whole of Congress' power to grant. The power entrusted to the Commission is based on Congress' "authority to regulate commerce with foreign nations and among the several States". (16 U.S.C. 796(8)) The totality of Congress' authority is "to regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes" (U.S. Constitution, Art. I, Sect. 8). This is not the first time the Act is construed that the Commission's authority is not as broad as that of Congress to grant. *Conn. L & P* v. *F.P.C.*, 324 U.S. 515, 529-530 (1948). The arguments on brief generally overlook this distinction.

IV

POSITIONS OF THE PARTIES

Briefly, the Muckleshoots and Staff argue that the White River is navigable water of the United States and as such, jurisdiction over the project arises through Section 4(e) and 23(b) set out above. Interior and the Muckleshoots specifically argue that although none of the physical structures of the White River Project is located within the geographic boundaries of the reservation, the project affects the reservation under the terms of the 1920 statute and, in particular, that the diversion of water from the reservation deprives the Muckleshoots of treaty-protected rights in certain natural resources. Additionally, the Muckleshoots, Interior and Fisheries assert that the project occasionally utilizes surplus water from the government dam at Mud Mountain—a benefit from a Federal project assertedly causing jurisdiction to attach. The Muckleshoots individually claim the Commission has jurisdiction over the project because of the White River's effect on interstate commerce. It contends that even if the White River were to be considered non-navigable, it is so important to the downstream navigable capacity of other rivers that it has an overall effect on commerce.

Puget takes the position that the White River does not meet the most basic tests for navigability. Regarding its use as a navigable stream, Puget asserts that there is no evidence that these activities were regularly or very successfully accomplished. Puget further asserts that the Commission has no jurisdiction merely because the project has some effect on the Indian reservation. It strenuously avers that Section 4(d) of the 1920 Act clearly gave the Commission jurisdiction only where the project was located on navigable waters or upon any part of the public lands and reservations of the United States. Puget also emphatically denies the Commission's right to jurisdiction over the project based upon the use of surplus water from the Mud Mountain Dam. Mud Mountain, it asserts, is a single-purpose flood-control project; was developed 37 years after the construction of the project; has no contractual relationship with the project; and is not operated to purposefully benefit the project.

V

DISCUSSION AND FINDINGS

In a companion proceeding, (Project 2495) Puget reluctantly also asked the Commission to determine whether FPC jurisdiction had attached to one of its several Washington plants. In finding jurisdiction in that case, the Commission found that construction had occurred since the adoption of amendments to Section 23(b) of the Act and that the Congressional policy in enacting that statute favored finding jurisdiction, FPC 1975. Those amendments required Commission licensing of previously non-jurisdictional projects if they had undertaken subsequent "construction". Such is not here at issue. No party to this proceeding has argued that any construction has occurred which would make Project 2494 jurisdictional. Questions regarding jurisdiction arising out of this action, therefore, involve issues of:

(A) Whether the White River is navigable under Section 3(8) so as to confer jurisdiction under Section 4(e) of the Act.

(B) Whether the effect of the project upon the Muckleshoot Reservation under Section 3(2) is relevant under Section 4(e) of the Act.

(C) Whether the project utilizes surplus water from a government dam in such a way as to confer Commission jurisdiction under Section 4(e) of the Act.

A. Navigability

The question of the stream's navigability has been the key question throughout this phase of the proceeding. Evidence has been tendered to demonstrate numerous transportation and commercial uses of various segments of both the pre-1906 stream system[1] and the present system. While the question of

[1] This "River" is a changing animal. Originally the White River flowed from its source at Mount Rainier in a northwesterly direction toward Puget Sound. Near Auburn, Washington, the White was joined by the Green River and continued as the White River. As the water continued to move

(footnote continued on following page)

navigability is not based solely on an evaluation of that portion of the river affected by the project at the time of its construction, the examination of the portion of the river where navigability is claimed is the prime area to be investigated. Consequently, while all of the evidence on navigability has been weighed, the greater weight has been awarded that evidence given to the portion of the river directly impinged upon by the project.

1. The River As a Transportation Mechanism

The record of this proceeding is replete with accounts, analyses, and conjecture regarding the feasibility and degree of use of the White River for transportation. A review of this testimony is necessary to ascertain the White River's navigability.

Thomas M. Statson, a licensed professional engineer in the State of California, testified on behalf of the Muckleshoots from historic records of water flows in the White River—including those published by the U.S. Geological Survey. He concluded that the low flow of the White River in its natural state in that portion of the river at issue was approximately 300-400 cubic feet per second, which, in his opinion would support canoe traffic. Barbara Lane, an anthropologist, analyzed the studies of several early historians in order to ascertain the existence of traditional Indian villages along the White River. Through earlier studies (1917-1920) by T.T. Waterman, an anthropologist at the University of Washington, she determined that a

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(footnote continued from preceding page)
downstream it was joined by the Black River and then by the Cedar to form the Duwamish which flows into Elliot Bay of Puget Sound at Seattle, Washington. In 1906 a flood altered the course of the White River, causing it to flow into the Stuck River at a point west of the Muckleshoot Indian Reservation. The river continues as the White-Stuck until it joins the Puyallup River and ends up in Commencement Bay of Puget Sound at Tacoma, Washington. Puget's diversion of a portion of the river between Buckley and Dieringer occurred between 1909 and 1911 as a part of the construction of the White River Project. As a flood control measure, King and Pierce Counties constructed a dyke in 1915 which made the river's post-1906, flood-altered course permanent. Since 1915 the course of the river has been literally "set-in-concrete." See Appendix A—Map of the White River System. Houses are built on the 19th Century river bed and the lower reaches of the Puyallup are used by small craft at Commencement Bay.

village existed along the river near the present town of Enumclaw, Washington. This is an area within the 16-mile diversion of water from the stream bed. She further theorizes that, since villages were located near water so the villagers would be able to use river transportation, the relevant portion of the river was navigable.

Witnesses Starr, Barr and Williams, all Muckleshoot tribe members, testified of their remembrance of canoe travel along the river. Louis Starr, age 75 at the time of the hearing, paddled the river in large canoes at a time before diversion when the White was a "whole river", a river which "a man couldn't walk across. . ." (Tr. p. 253). Maggie Barr, a 79-year-old Muckleshoot Indian who has spent a lifetime on the reservation, remembers as a teenager that the river used to "rage" when "the White River flowed into the Green River" (Tr. p. 258). Presumably this is reference to the spring run-off prior to 1909—the date of the project.

Robert Paul Thomas, of the Department of Economics at the University of Washington, testified on behalf of Puget. He investigated reports by early historians and military officers dating back to 1854, and, based upon these reports, concludes that the reach diverted by the White River Project above Auburn was " . . . clearly unfit for navigation . . ." and that ". . .diligent research has revealed no evidence of any navigation ever occurring above Auburn" (Tr. p. 56).

2. The River As a Mechanism of Commerce

a. Log Floatation and Shingle Bolts

It is undisputed that shingle bolts were floated commercially on several of the rivers in the area of the White River Project.[1] Statson believes that the pre-diverted White River could have handled these bolts:

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[1] Evidence of regular and commercially successful use of a river for transporting logs in commerce has been shown to justify the Commission's conclusion that the river was navigable and therefore jurisdictional. *Wisconsin Public Service Corp.* v. *F.P.C.*, 147 F.2d 743, 746-747 (7th Cir. 1945) and cases cited therein. A shingle bolt is a piece of wood normally cedar, suitable for making shingles and generally cut into pieces 18 inches in length from the log.

> The shingle bolts would be of western red cedar and depending upon the percent of heartwood and percent of sapwood and the moisture content of such wood the displacement would vary. However, it is my opinion that squared off shingle bolts would float in the river with no more than half of their depth submerged. If western red cedar logs were floated in the river, that is logs still having their bark intact and being generally round, I would estimate that they would float with no more than about two-thirds of their diameters submerged. (Tr. p. 142)

Muckleshoot witnesses also sought to prove the use of the White River for shingle bolt flotation. Starr recalls shingle bolts being floated through that section of the river with which we are concerned here—i.e., "down to Sumner from way up in the mountains." (Tr. p. 255). Starr also emphasizes that the cedar bolts were cut by non-Indians as well as Indians and were floated from a point upstream of both the Buckley Diversion Dam, and the present Mud Mountain Dam. Williams stated that ". . . the river was big before they changed it," (Tr. 262) and witness Lozier testified, "It used to have lots of water. Now you can walk across" (Tr. 267).

Puget witness Thomas testified otherwise. After reviewing historical material concerning the area, he found ". . . no evidence of any navigation ever occurring above Auburn, nor is there any evidence we could find of log drives on this section of the White River" (Tr. p. 56). That portion of the White River which is diverted by the project lies principally upstream of Auburn, Washington.

b. Traders, Trade and Other Commerce

Arthur Williams, who has lived in the area for over 60 years, recalls that trading fish, hides and berries occurred between Canadian Indians and the Muckleshoots. The traders, Williams asserts, were brought together by maneuvering their canoes along the river. Lane testified that her research indicated the use of steamers and barges on the White River upstream from Auburn—a small portion of which is within the 16 miles of the stream's diversion. Lane's testimony, stemming from a booklet published in 1865, entitled, "Navigable Streams West of the Cascades." (Exh. 47), is that one Asa Mercer

described the Duwamish River as being formed by the Black and White Rivers. Mercer concluded the Duwamish-White to be navigable for steamer use for a distance of some 32 miles; which apparently brought steamer navigation inland as far as Auburn. Lane concludes, therefore, that the Duwamish-White River system was used by shallow draft steamboats, barges and scows upstream as far as the confluence with the Green River.

3. Findings

Section 3(8) of the Federal Power Act vests the Commission with jurisdiction over only those hydroelectric projects which are located on waters which are or were navigable. This has been the law since 1920—i.e., 9 years after the project was completed and 53 years before the pending application was filed.[1] In the *U.S.* v. *Appalachian Electric Power Company*, 311 U.S. 377 (1940), the Supreme Court established criteria for determining a river's navigability for FPC jurisdictional purposes. In *Rochester Gas and Electric Corp.* v. *Federal Power Commission*, 344 F.2d 594, 596 (2d Cir. 1965), the Second Circuit succinctly applied the *Appalachian* criteria to a subsequent Commission proceeding by stating a river to be navigable if (546):

> "(1) it *presently* is being used or is suitable for use, or (2) it has been used or was suitable for use in the *past*, or (3) it could be made suitable for use in the *future* by reasonable improvements."

Thus, if jurisdiction over the project is to be based on navigability, the affected portion of the White River must meet some portion of the *Appalachian* test. No party argues that the White River is presently navigable in the area affected by the project. Nor does anyone suggest improving the river so as to make it navigable. We are, therefore, left only with the middle ground, whether or not the affected area was, in fact, navigable at some earlier time.

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[1] Laches does not apply. Clearly, however, time is not of the essence in disposing of this claim.

The evidence does not show navigability as that term is used in the statute. Prior to 1906 the White River was a portion of the White-Duwamish River System, a generally unstable glacially-fed river system.[1] Staff elaborately and thoroughly cites a body of testimony picking up isolated uses on 75 miles of river, only 16 miles of which were directly affected (see Staff Brief, pp. 4-12). Giving full evidentiary weight to these isolated uses, however, does not make a case for navigability for that portion of the river primarily at issue here. To begin with, the fact of the matter is that not even shingle bolt floatation could be accomplished on this stream in its natural state at a time contemporaneous with the project's construction. The Supreme Court of Washington so found in *Sumner Lumber & Shingle Co.* v. *Pacific Coast Power Co.*, 131 P. 220 (1913). The court states (p. 222):

> . . .It is apparent that, if dependency was had upon the natural condition of these streams, few, if any, shingle bolts would ever reach respondent's mill. The river is a glacial stream, subject to material variation during each summer day on account of the glacial tide. A chart showing the flow is in the record. From this chart it appears that it is

[1] Final control of the flash flood aspects of this glacial stream was not possible until construction of the Mud Mountain Dam flood control project in 1948. While not fully discussed on the record, the White River, in fact, is a classic example of a glacier-fed stream. It is the principal recipient of water from melt-water channels fed by Emmons Glacier, a massive terminal moraine descending from Mount Rainier. Before construction of the Mud Mountain Dam, winter rains on Emmons and spring thaw from the Glacier resulted in a history of flooding throughout the lower Puyallup Valley. Mud Mountain has controlled these common glacial flooding conditions and has additionally lessened the threat of flooding due to glacial outwash, avalanche and burst out. The Geological Survey reports that outwash from Emmons has significantly altered melt-channel flow and course during the past 100 years. Additionally, the survey concludes that avalanches and landslides have occurred at Emmons since at least the 16th Century. There are no reported incidents of outburst flooding on Emmons Glacier but the survey holds such flooding to be unpredictable. Several outburst floods have been recorded on neighboring Mount Rainier glaciers in recent years. See, Sigafoos and Hendricks, "Recent Activity of Glaciers of Mount Rainier, Washington", Geological Survey Professional Paper 387-B (1972); Richardson, "Glacier Outburst Floods of the Northwest", Geological Survey Professional Paper 600-D (1969); Hodge, "The Movement and Basal Sliding of Nisqually Glacier of Mount Rainier", Naval Contract-N00014-67-A-0103-0007 NR307-252 (1972).

> not an unusual thing for the flow to increase or diminish nearly 100 per cent. within a day or two. The result of this intermittent flow is that the bolts are lodged all over the bed of the river, which, on account of numerous past floods and erosions, averages nearly 100 feet, and require constant handling to keep them in the drive.

One cannot dismiss the impact and factual basis of this case on the hypertechnical legal grounds suggested by Staff. Ignoring a local court's evaluation in 1913 of almost the same facts urged 70 years later borders on the absurd. We are still faced with a lack of convincing evidence that the short stretch of river here supported a reasonable commercial enterprise on the basis of the stream's natural or ordinary navigability. As far as navigability was concerned even with aids, the court's decision shows the marginal aspects of the operation, the limited water available for any navigation, and the need for use of the stream banks as an auxiliary aid for even the marginal navigation attempted.

The Commission, in dealing with evidence of logging operations, a more usual index of commercial use of a waterway, has repeatedly required extensive showings of commercial operations before Commission jurisdiction will attach. In *Central New York Power Corp.*, 8 FPC 390, 8 FPC 547 at 563 (1949), for example, the Commission based jurisdiction on logging activity where the party seeking jurisdiction showed that the river had been used for commercial logging for nearly 150 years. Similarly, in *Wisconsin* v. *F.P.C.*, 214 F.2d 334, 337 (7th Cir. 1954), the court affirmed the Commission jurisdiction on the basis of log drives when it was shown that such activities had been conducted regularly and involved millions of feet of lumber. Thus, Commission jurisdiction arising from logging operations consistently has been based upon substantial evidence of continuous and extensive use of the river for log-floating purposes. See also, *New York Power & Light Corp.*, 8 FPC 231 (1949); *Dairyland Power Cooperative*, 8 FPC 1276 (1949). As stated by the court in *U.S.* v. *Rio Grande Dam Irrigation Co.*, 174 U.S. 690, 698 (1898):

> "...The mere fact that logs, poles, and rafts were floated down a stream occasionally and in times of high water does not make it a navigable river...."

We turn next to the only other evidence that supports a finding of navigability—the testimony of the Muckleshoot witnesses about childhood remembrances. The evidence here of the size and use of the White River by those witnesses, however, is less than convincing. Witness Williams, for example, testified that "the river was big before they changed it," (Tr. 262) but as a matter of fact, this is not an eye-witness account since he was not born until after the project was completed. Witness Starr, in discussing the White River before it was diverted, testified that: "My dad hauled people across ...these WPA people, white people. That was after Hoover lost his term as President and Roosevelt was President." (Tr. 254). Starr's testimony on its face appears inconsistent since the project was completed and the river diverted 22 years before Hoover left the Presidency. Witness Lozier testified that he fished on the White River. "The river was big then. It used to have lots of water. Now you can walk across." (Tr. 267). Again, this witness must be referring to another portion of the White River, as diversion by the project predates Lozier's birth. While there is a desire to accord the greatest weight to this testimony, it still weighs in light.

Nor is the case for a finding of navigability bolstered by any documented evidence of substantial traffic along the White River between Buckley and Dieringer. In fact, such evidence is non-existent within the four corners of this record. The best gloss that can be placed on witness Lane's testimony is that there is a strong possibility of the past existence of a traditional village upstream of the current project. She hypothesized the use of canoes along the White River as the primary means of travel to the probable village which generally were built along streams. Lane's own exhibit (Exh. M/L303), however, indicates that if this village did in fact exist, it was a considerable distance from the White River on a small creek which could not possibly support canoe traffic. Furthermore, maps kept by the White River Historical Society establish the existence of a road running through the location of the purported village, thereby

negating much of the need for water as a transportation means. Neither the Commission nor the courts have found navigability on such weak, inconclusive, and sketchy evidence. The Supreme Court discussed evidence of navigability similar to that offered in the instant case in *The Montello,* 87 U.S. 430 (1847), wherein the court stated (p. 442):

> . . .It is not, however, as Chief Justice Shaw said, [*Rowe* v. *Granite Bridge Co.*, 21 Pick. 344], 'every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture.'

In *Leovy* v. *United States,* 177 U.S. 621, 632 (1900), the Court more narrowly defined the term "Navigable Waters of the United States" when it stated that such ". . .has reference to commerce of a substantial and permanent character to be conducted thereon." The waterway in question must be susceptible for use as a channel of useful commerce and not merely capable of exceptional transportation during periods of high water. See *Brewer Oil Co.* v. *United States,* 260 U.S. 77 (1922) and cases cited therein.

In light of the Court decisions, both State and Federal, the Commission decisions, and the record presented in this proceeding it is concluded that jurisdiction over the White River Project No. 2494 should not, and cannot, be found on the grounds of the navigability of the White River in the area affected by the development.

B. Effect on the Muckleshoot Reservation

Section 4(e) of the Act grants the Commission the authority to license power projects located upon any part of a reservation (16 U.S.C. 797(e)). The Act defines "reservation" so as to encompass ". . .tribal lands embraced within Indian reservations, . . .". (16 U.S.C. 796 (2)). Relying on these provisions, the Muckleshoots advance the proposition that jurisdiction over the project attaches by virtue that the development is located on their reservation. Alternatively the

Muckleshoots, and here they are joined by the Department of the Interior, argue that even if the project is not physically located on reservation lands, jurisdiction still arises because of the effect of the project upon the Muckleshoots.

1. Location on Reservation Land

The Muckleshoot Indian Reservation, as defined and described by the aforementioned Indian Reorganization Act of 1935, lies within the area between Puget's diversion dam at Buckley and the Dieringer tailrace. While none of the physical structures of the project is located within the confines of the reservation, it is argued that up to two-thirds of the White River's natural flow through the tribal lands during periods of the year has been diverted by the project.[1] The Muckleshoots argue that the right to use certain waters may be a coextensive property right of a reservation. *Winters* v. *United States*, 207 U.S. 564 (1908); *United States* v. *Powers*, 305 U.S. 527 (1939); *Arizona* v. *California*, 373 U.S. 546 (1963). In support of this argument, the Muckleshoot witnesses discussed the use of the river for fishing purposes. All had recollections as previously discussed, of fishing for food and for trade in the waters of the White River. The Tribe contends, therefore, that where a river plays such an integral role in the existence of the riparian people, the river becomes a part of the reservation.

Secondly, the Muckleshoots contend that Section 3(2) of the Act (16 USC § 796(2)) defines "reservation" so as to include the bed of the White River and the water and fishing rights reserved by the Tribe. The Tribe asserts that the water and fishing rights and the White River bed constitute "tribal lands embraced within Indian reservations," or "interests in lands owned by the United States" in trust for the Muckleshoots. Citing, *Choctaw Nation* v. *State of Oklahoma*, 397 U.S. 620 (1970). Since the river bed is part of the reservation, the Muckleshoots aver that so is the water, citing *United States* v. *Pollmann*, 364 F. Supp. 995 (1973). The Muckleshoots' position, in final analysis, is that the effect of the project upon

[1] Low water at times other than glacial run off, in fact, may be a result of climatological changes over the past 60 years having nothing to do with any man-made or induced phenomena, but no party developed this possibility on the record.

the Tribe is so great as to make the project jurisdictional even if the project is not physically on the reservation. See, *e.g.*, *Pacific Gas and Electric*, 2 FPC 516 (1941). As mentioned, the Muckleshoots assert that the reduction of river flow through the reservation has been disasterous to their fishing.

The Department of the Interior presented James L. Heckman, a fishery biologist, who testified as to the effect of Project 2494 on fishing in the area of the Muckleshoot Reservation. Heckman testified, based upon his knowledge of the background of the White River fishery, that the affected area, ". . .has in the past supported substantial runs of spring and fall chinook, coho and chum salmon as well as steelhead trout." When questioned regarding the present White River condition he stated:

> Anadromous fish production in the White River between the Buckley and Dieringer diversion is low and has been for many years. While there are many complex and interacting factors which contribute to this low production, the primary cause for the low fish production of the White River is a lack of adequate stream flow for a significant portion of the year below Puget Sound Power and Light Company's diversion dam. This low flow adversely affects both upstream and downstream fish migrations and substantially reduces the spawning and rearing potential of the river.
>
> . . .In my estimation the critical problem confronting the anadromous fish is the White River Project No. 2494. (Tr. 100-101)

Interior therefore concludes that the loss to the Tribe of the beneficial use of the White River constitutes the destruction of one of the reservation's natural resources within the meaning of Sections 4(e) and 3(2) of the Federal Power Act (16 U.S.C. § 796(2)).

Puget draws no such conclusion and argues that the pertinent language from the 1920 Act gives the Commission licensing jurisdiction only if the project is located *upon* public lands or reservations. There is no mention of the word "affecting" within the relevant portions of the statute. Addi-

tionally, Puget argues, an investigation of the legislative history of both the 1920 Act and the 1935 amendments indicates that Congress intended any use of the term "affect" to mean "upon".

Puget also avers that the Commission has never required that a project be licensed where the development's effect on public lands or reservations was other than being located upon such property. It cites *Re The Pigeon River Lumber Co.*, 12 P.U.R. (NS) 452 (FPC 1935) as directly in point. The Commission was there concerned with a number of proposed dam sites, some located on and some off the Grand Portage Indian Reservation. Puget asserts that the Commission conclusion in *Pigeon* that the two dam sites off the reservation property did not affect government property, "clearly posits that a project must be constructed inside or upon government lands or reservations to affect them." (Puget Initial Brief 20.)

2. Findings

We deal first with the Muckleshoots' argument that the water has been reserved for the Muckleshoots' exclusive use. In *Winter, supra,* settlers in Montana had diverted a river's flow away from a reservation, thereby denying the Indians the ability to use the water. The court first found that the land within the reservation was arid and without irrigation and was practically valueless. It concluded that without the water the land was uninhabitable; and therefore, the treaty, despite no specific language reserving the water, must have intended that the tribe have a reserved right to use the river. The court was faced with a similar issue in both *Powers, supra,* and *Arizona* v. *California, supra.* In *Powers,* the court determined that the treaty which initially established the reservation had contemplated the Indians' utilization of the land for agricultural purposes. Since water is necessary for cultivation, the court concluded the treaty operated by implication to reserve the waters within the reservation for the benefit of the tribe. The 1963 decision in *Arizona* v. *California,* determined that water had been ceded by the government to the affected tribes at the time of the original treaty. The court again concluded that

without the use of the water for irrigation purposes life on the reservation could not be sustained. The Indians' rights to the water again were upheld.

Clearly, these cases have a thread of commonality. The water right sought to be protected involved irrigation of tribal lands and absence of the water would render the land uninhabitable. This is not the case at bar. There is no evidence to indicate that the absence of the river renders the reservation lands "valueless" (*Winters, supra,* at 576) or ". . . that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised." *Arizona, supra,* at 599.

Also, since the language of treaties between Indian tribes and the United States government are often styled in ambiguously broad terms, courts have found it necessary to interpret the inferences embodied within those agreements. The Muckleshoots analogize their situation with that of the Choctaw and Cherokee in *Choctaw Nation* v. *Oklahoma,* 397 U.S. 620 (1976). There, the court interpreted the treaty agreements of Dancing Rabbit Creek, Sept 7, 1830. 7 Stat. 333-334; and New Echota, Dec. 29, 1835, 7 Stat. 478, as giving the tribes ownership of certain portions of the bed of the Arkansas River. In making such a decision the court examined the language of the agreements and the contemporaneous facts surrounding their development. It is at this point of the examination that *Choctaw* becomes readily distinguishable from the instant case. The language of the *Choctaw* treaties provides for the land reserved for Indian use to be given to the tribe in "fee simple" and never be ". . . embraced in any Territory or State." Dancing Rabbit Creek (p. 625). Such language of sovereignty was authorized in order that the affected tribes be made to understand the permanence of this reservation. Both the Choctaw and the Cherokee were scarred from governmentally ordered "resettlement" to escape the onslaught of white migration and violation of prior treaties. It is clear that Congress intended to in some way ameliorate the tragedy that had befallen these people in "The Trail of Tears." See the concurring opinion of Justice Douglas, 397 U.S. at 636.

The Muckleshoots offer no evidence of Congressional intent to deed the White River, either its bed or its water, to the Tribe. The treaty of Point Elliot ultimately affirmed by executive order of President Grant, established the Muckleshoot Reservation, "... for the exclusive use of the Indians in that locality ...." There is no mention of land being conveyed in fee, of the Indians' power to govern the land, or any pledge that said land should be exempt from territory or state control. In order that an inference may be drawn regarding the intent of Congress that an Indian tribe have title to a river bed, the intention must be clear and is not lightly to be inferred. *United States* v. *Holt Bank*, 270 U.S. 49, 55 (1926). If there, in fact, were an intent on the part of Congress to cede the river bed and water of the White River to the Muckleshoot Tribe, such has not been presented by the record of this proceeding.

As stated earlier, the Commission's licensing jurisdiction may not go beyond the Federal Water Power Act of 1920 (16 USC 791-823). Section 4(d) of the 1920 Act limited the Commission's licensing jurisdiction to projects located "... upon public lands or reservations."

The case offered as precedent for finding that the project need only affect public land is *In the Matter of Pacific Gas and Electric*, 2 FPC 516 (1941). The project under consideration there was a post-1935 development which was an "integral part of a comprehensive development of the water resources of the region." (at 529). As such, the fact that the element of the total project under consideration was not on public land was immaterial to the scope of the entire construction. The rest of the operation was on public land, and this segment of the whole, therefore, fell within the ambit of Federal licensing authority. Such is not the case here. To require licensing of a project located totally on non-public land because of it may have some effect on public land is beyond the scope of the 1920 Act. See *Pigeon River Lumber, supra.*

C. Use of Surplus Water From a Government Dam

Licensing jurisdiction may be predicated on Section 4(e) of the Act which grants the Commission jurisdiction if a project utilizes "the surplus water or water power from any Government dam," (16 U.S.C. § 817). As stated, *supra*, the Mud

Mountain Dam is a flood control project located upstream from Puget's Buckley Diversion Dam. The dam regulates the flow of water down the White River and thereby controls flooding in the lower Puyallup Valley. When the river is in a non-flood condition the Corps of Engineers regulates that flow at the request of interested parties, including Puget. When storage water is released at rates different than run-of-river flow, Project 2494 is provided with either an increase or decrease in water for power production.

1. Evidence

The Muckleshoots argue that flow manipulations of water coming from Mud Mountain inure to the benefit of Puget. When more water flows, more power can be produced. When less water flows, Puget can maintain and repair its flash boards. The Muckleshoots contend that Mud Mountain's accommodation of Puget's needs for greater or diminished flow makes the project jurisdictional under the surplus flow clause of the Act.

The Commission, the Muckleshoots advance, settled the issue regarding surplus water use in *The California Oregon Power Company*, 13 FPC 1 (1954), wherein it stated (P. 41):

> . . . Where there is available stored water. . . .above that needed for irrigation and which would otherwise flow unused down the main channel of the stream, that water is surplus water, and if used for power development, would require a license from this Commission. . . .

Fisheries offered witness Lloyd Phinny who testified of numerous occasions in which the flow from the Mud Mountain Dam had been regulated for Puget's benefit (Tr. 93-94). Additionally, Fisheries looks to the Mud Mountain Reservoir Regulation Manual which contains provisions allegedly designed to coordinate Mud Mountain operations with those of Puget. The Department believes such actions are not in keeping with those of a single-purpose flood-control project. Such conjunctive operations between Project 2494 and a government dam, it argues, gives the Commission licensing jurisdiction.

Puget offered the testimony of Norman MacDonald of the Corps of Engineers. MacDonald, who directs operations at Mud Mountain testified that the Corps had no contracts or agreements to coordinate operations with any group or entity downstream of the Mud Mountain Dam (Tr. 63). He admitted that the Mud Mountain project coordinates with downstream water users, including Puget, whenever possible. However, a study conducted in the late 1950's to determine whether Mud Mountain could be operated to provide power for the White River resulted in a conclusion of total infeasibility. MacDonald asserts the dam is a single-purpose flood-control project and any benefits which accrue to Puget are incidental.

2. Findings

The Mud Mountain Project is operated by the Corps of Engineers as a flood-control project to protect the lower Puyallup Valley. Mud Mountain was not constructed in cooperation with Project 2494, but was built 37 years later. Benefits which fall to Puget as a result of Mud Mountain's regulation of water flow do, in fact, improve the effectiveness of Project 2494. Such improvements do not inure to the benefit of Puget at any burden or cost to Mud Mountain and are totally incidental and unpredictable. There is no contract, as in *California Oregon Power, supra*, or corresponding agreement between the two entities. The use of surplus water from the Mud Mountain Dam by Puget does not give the Commission licensing jurisdiction over Project 2494.

VI

CONCLUSION

The affected reach of the White River does not constitute a navigable river as defined by Section 3(8) of the Federal Power Act (16 U.S.C. § 796(8)). The effect of this pre-1935 Project 2494 upon the reservation does not confer licensing jurisdiction upon the Commission. Additionally, Puget's use of surplus water from the governmentally operated Mud Mountain Dam does not advance Commission jurisdiction based upon Section 4(e) of the Act. Project 2494 therefore is not subject to the jurisdiction of the Federal Power Commission under Section 4(e) of the Federal Power Act (16 U.S.C. § 797(e)).

For all of the reasons stated above, the application is denied for want of jurisdiction.

Appendix C

PUGET SOUND POWER & LIGHT COMPANY—Project No. 2494

OPINION NO. 2

OPINION AND ORDER FINDING WHITE RIVER TO BE NAVIGABLE, REVERSING INITIAL DECISION AND GRANTING INTERVENTION

(Issued October 28, 1977)

Before Commissioners: CHARLES B. CURTIS, Acting Chairman; DON S. SMITH and GEORGIANA SHELDON, Acting Commissioners.

Digest Section	Syllabus
2601	The Commission reverses an initial decision holding that the relevant reach of a certain river is not a navigable water of the United States. Thus, it denies a power company's request for permission to withdraw its license application for a project on that river.

APPEARANCES

DOUGLAS P. BEIGHLE, WILLIAM S. WEAVER and JOHN C. MASON for Puget Sound Power and Light Company

JOSEPH L. CONIFF, JR., for Washington Department of Game and Washington Department of Fisheries

CHARLES E. O'CONNELL, JR., for The Secretary of the Interior on behalf of the Muckleshoot Indian Tribe

L. GRAEME BELL, III, THOMAS L. SMITHSON and ALEXANDRA HARMON for the Muckleshoot Indian Tribe

JOHN GOSSELL and LINDA L. LEE for the Staff of the Federal Power Commission

1. On October 1, 1977, pursuant to the provisions of the Department of Energy Organization Act (DOE Act), Public Law 95-91, 91 Stat. 565 (August 4, 1977) and Executive Order No. 12009, 42 Fed. Reg. 46267 (September 15, 1977), the Federal Power Commission ceased to exist and its functions and regulatory responsibilities were transferred to the Secretary and the Federal Energy Regulatory Commission (FERC) which, as an independent commission within the Department of Energy, was activated on October 1, 1977.

2. The "savings provisions" of Section 705(b) of the DOE Act provide that proceedings pending before the FPC on the date the DOE Act takes effect shall not be affected and that orders shall be issued in such proceedings as if the DOE Act had not been enacted. All such proceedings shall be continued and further actions shall be taken by the appropriate component of DOE now responsible for the function under the DOE Act and regulations promulgated thereunder. The functions which are the subject of these proceedings were specifically transferred to the FERC by Section 402(a)(1) of the DOE Act.

3. The joint regulation adopted on October 1, 1977 by the Secretary and the FERC entitled "Transfer of Proceedings to the Secretary of Energy and the FERC," 10 CFR , provided that this proceeding would be continued before the FERC. The FERC takes action in this proceeding in accordance with the above mentioned authorities.

4. The White River flows about 57 miles in a general northwesterly direction from the foot of Emmons Glacier on Mount Rainier to its confluence with the Puyallup River, which river, in turn, flows an additional 10 miles also in a general northwesterly direction into Commencement Bay on the Puget Sound at Tacoma, Washington. Prior to 1906 the main stream of the White River turned toward the north at Auburn, Washington, where it was joined by the Green River, and flowed in a general northerly direction to its confluence with the Black River, which rivers formed the Duwamish River which, in turn, flowed into Elliott Bay on the Puget Sound at Seattle,

Washington.[1] We find that the White River is one of the "navigable waters" of the United States within the meaning of Section 3(8) of the Federal Power Act[2], upstream from both of its mouths at least to the vicinity of Buckley, Washington. And we conclude that Puget Sound Power & Light Company (Puget Power) is prohibited by Section 23(b) of that Act[3] from operating and maintaining its diversion dam in and across the White River at Buckley, together with all other works of its White River Project which are incidental to the development of electric power from the White River waters which it diverts at Buckley, without a license issued pursuant to Section 4(e).[4]

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[1] See Appendix A which is derived principally from Exhibit No. 36, a U.S. Geological Survey map of the White and Green River basins.

[2] Section 3(8) defined the term "navigable waters" as meaning "those parts of streams or other bodies of water over which *Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States*, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, *are used or suitable for use for the transportation of persons or property in interstate or foreign commerce*, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority".

[3] Section 23(b) provides, in pertinent part,

> "It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any *of the navigable waters* of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a . . . license granted pursuant to this Act . . ."

[4] Section 4(e) authorizes the Commission, among other matters,

"To issue licenses . . . for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for . . . the development, transmission and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam . . ."

THE WHITE RIVER, PAST AND PRESENT

5. The White River is an unusual waterway in that, historically, it has had two mouths. Prior to 1906 its main stream turned toward the north at Auburn, where it was joined by the Green River, and eventually formed the Duwamish River which flowed into Puget Sound. A lesser stream, at least during periods of high flow, entered the nearby Stuck River at Auburn, which river turned toward the south and joined the Puyallup River at Sumner, Washington. In 1906 floodwaters of the White River formed a barrier of boulders, gravel and other debris across the bed of its main stream at Auburn, causing it to enlarge its channel into the Stuck River which, thereupon, became the channel for the White River. And thereafter the local governments constructed additional barriers to make the change in channels permanent,[5] and eventually permitted the construction of houses and other structures in the former bed of the White River.

6. In 1912 Puget Power's predecessor, Pacific Coast Power Company, completed and placed into operation two generating units of the so-called White River Project. Additional units were added in 1918 and 1924. The principal project works include the diversion dam at Buckley (river mile 24.2), which is 352 feet long, rises 4 feet above the natural bed of the river and includes a system of removable flashboards which can increase the water level an additional 7 feet. The dam diverts water from the White River through a series of flumes, canals and settling basins into Lake Tapps, which is a storage reservoir. The water is then taken by penstocks to the powerhouse at Dieringer, Washington, where it is discharged through a tail-race into the Stuck River at river mile 3.4. Puget Power's 14-mile man-made waterway thereby by-passes almost 21 miles of the White and Stuck Rivers of which about 6 miles of river flow in and out of portions of the Muckleshoot Indian Reservation, established by treaty in 1857.

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[5] Today, the White River is known as the Green River in its reach from Auburn to the Duwamish River, and the Stuck River is known as the White River. For clarification, the name "Stuck River" will be used herein to refer to the former Stuck River as well as the reach of the White River which was formerly known as the Stuck River.

7. The gradient of the White River descends at an average rate of approximately 32 feet per mile from Puget Power's diversion dam, past the Muckleshoot Indian Reservation and to a point on the Stuck River which is some two to three miles above Puget Power's Dieringer tailrace. From that point, the gradients of the Stuck and Puyallup Rivers descend at a combined average rate of about 4 feet per mile on their journey to Puget Sound. And from its confluence with the Green River at Auburn, the former White and Duwamish Rivers also descended at about 4 feet per mile to Puget Sound.

8. Being a relatively short glacial stream and one which also drains a small portion of the western slope of the Cascade Range, the flow of the White River is significantly affected by the impacts of the weather upon the melt of Emmons Glacier and of the moist Pacific winds upon the Cascade Range. As a result of such impacts and steep gradients in mountainous areas, the White River is subject to periodic freshets which are characterized by rapidly moving waters and which carry downstream considerable amounts of debris, including boulders and gravel. Freshet and similar conditions cause Puget Power to remove the flashboards from its diversion dam and close its diversion intake.

9. On the basis of figures published by the Geological Survey of the Department of the Interior, the White River at a measuring gauge near Buckley can expect a 7-day low flow of 480 cubic feet per second (cfs) every two years, 390 cfs every five years, 340 cfs every 10 years and 300 cfs every 20 years. Similarly, it can expect a 30-day low flow of 600 cfs every other year, 500 cfs every 5 years, 440 cfs every 10 years and 400 cfs every 10 years.[6] At the same gauge, the White River can expect a flow of at least 2,700 cfs 10% of the time, 2,000 cfs 20% of the time, 1,600 cfs 30% of the time, 1,300 cfs 40% of the time, 1,100

[6] The figures are based on 1946-1964 data. At a measuring gauge just upstream from Puget Power's Dieringer tailrace the Stuck River can expect a 7-day low flow of 58 cfs every two years, 47 cfs every five years, 41 cfs every 10 years and 37 cfs every 20 years. Similarly, it can expect a 30-day low flow of 70 cfs every other year, 56 cfs every 5 years, 50 cfs every 10 years and 46 cfs every 20 years. The effect of the White River Project on low flows therefore appears to be substantial, and such low flows adversely affect the anadromous species in the river, principally salmon.

cfs 50% of the time, 1,000 cfs 60% of the time, 800 cfs 70% of the time, 700 cfs 80% of the time and 500 cfs 90% of the time. Puget Power asserts that the White River at its diversion dam has an average annual flow of 1,440 cfs, and that under the terms of its water rights it may divert no more than 2,000 cfs from the White River, subject, however, to the requirement that it may not reduce the flow below 30 cfs, for fishery purposes.

10. In 1948 the Corps of Engineers (Corps) completed a single-purpose flood control dam known as Mud Mountain Dam in the White River about 5 miles upstream from Puget Power's diversion dam. In conjunction therewith, the Corps constructed and maintains a fish trap at Puget Power's diversion dam for the purpose of trapping and transporting anadromous species, principally salmon, to points on the White River upstream from Mud Mountain Dam.

PROCEDURAL BACKGROUND

11. In 1920 Congress enacted the Federal Water Power Act which provided in Section 23,

> "That any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce between foreign nations and among the several States, *may in their discretion* file declaration of such intention with the Commission, whereupon the commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not proceed with such construction until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State law [Emphasis added]."

12. In 1935 Congress reenacted the Federal Water Power Act as Part I of the Federal Power Act, substantially without change. Section 23, however, was divided into two subsections, (a) and (b), and the provision quoted in Footnote 3 was enacted as the first sentence of subsection (b). Furthermore, the above quoted paragraph of the former Section 23 was made part of subsection (b) and was modified to substitute the words "shall before such construction" for the words "may in their discretion". The Supreme Court considered these changes in *Federal Power Commission* v. *Union Electric Co.*, 381 U.S. 90 (1965), which is known as the Taum Sauk case, and said that Section 23(b) addresses two matters, first, who must file a declaration of intention—"all those who would locate a water power project on a nonnavigable stream within the jurisdiction of Congress"—and second, what projects on nonnavigable streams are required to be licensed—"Congress intended the inquiry into the project's effect on commerce to include, but not limited to, effect on downstream navigability." And the Supreme Court held that "Congress has required a license for a water power project utilizing the headwaters of a navigable river to generate energy for an interstate power system."

13. On November 20, 1964, shortly before the *Taum Sauk* decision, Puget Power filed an application requesting a decision that the Commission does not have jurisdiction to license the construction, operation and maintenance of the works of its White River Project or, alternatively, the issuance of a license. The White River Project was then assigned Commission No. 2494.

14. After *Taum Sauk*, Puget Power indicated its recognition of the Commission's authority to issue a license for its White River Project[7] and, together with the Commission staff, moved forward with respect to its licensing application. Notice

[7] As is discussed, *infra*, the record establishes without question that the White-Duwamish and Stuck-Puyallup river systems were navigable waters within the meaning of Section 3(8) in reaches downstream from Puget Power's White River Project. Apparently in Puget Power's view its White River Project utilized headwaters of navigable waters and, therefore, was required to be licensed under *Taum Sauk*.

of the application was given on March 6, 1967, and published shortly thereafter. And the Department of Fisheries and the Department of Game of the State of Washington (Departments) were permitted to intervene out of time by order issued July 7, 1967.

15. On January 20, 1972, the United States Court of Appeals for the Second Circuit decided in *Farmington River Power Company* v. *Federal Power Commission*, 455 F.2d 86, that a license is not required for a dam constructed prior to 1935 across a nonnavigable stream, rationalizing that the 1935 amendment to Section 23 made the filing of a declaration of intention mandatory with respect to any person "intending" to construct a dam or other project work, and that such mandatory requirement had no retroactive application. As a result, Puget Power, on January 15, 1973, requested permission to withdraw its license application for its White River Project contending, among other matters, that the White River is not navigable at the project. The Commission, by order issued November 20, 1973, permitted the Muckleshoot Indian Tribe (Muckleshoots)[8] to intervene out of time and set to hearing the question of the Commission's jurisdiction over that project. The Secretary of the Interior (Interior) was subsequently permitted to intervene out of time by order issued February 13, 1974.

16. A prehearing conference was held in Washington, D.C., on January 15, 1974, after which a hearing was held in Seattle, Washington, on July 30, and 31, 1974. Following briefing presiding Administrative Law Judge Nahum Litt issued an Initial Decision on March 3, 1976, in which he discussed the background evidence and law and concluded that Puget Power's White River Project is not subject to the Commission's licensing jurisdiction under any of the theories advocated by the parties, including the navigability of the White River. We have before us the briefs on exceptions which were filed by the Commission staff, the Departments and, jointly, the Muckleshoots and Interior, together with the brief opposing exceptions which was filed by Puget Power. We also

[8] The Muckleshoot Indian Tribe is organized formally under the Indian Reorganization Act, 25 U.S.C. § 476.

have before us a joint motion of the Muckleshoots and Interior to file a "Reply Brief on Exceptions", together with the brief and Puget Power's response opposing the motion. Additionally, we have before us a joint motion of the Muckleshoots and Interior for leave to present oral argument,[9] together with a petition of the Department of Ecology of the State of Washington for leave to intervene out of time, answers thereto which were filed by Puget Power and jointly by the Muckleshoots and Interior and a "response" of the Department of Ecology to Puget Power's answer.

NON-ISSUES

17. In view of our finding herein that the White River is a navigable water of the United States at least as far upstream as Puget Power's diversion dam at Buckley, we do not reach and will not, therefore, address the other theories of jurisdiction other than to explain them briefly and to note that they are opposed by Puget Power. The Commission staff contends, in this connection, that Section 4(g) of the Federal Power Act[10] gives the Commission authority to require owners of unlicensed water power projects to require an application for license, or to cease operation without a license, when a project comes within its licensing jurisdiction under Section 4(e), and the Commission is authorized thereunder to license project works across, along or in "any of the streams or other bodies of water over which Congress has jurisdiction" under its commerce powers. The Commission has jurisdiction over the White River Project, the staff continues, because it generates electric power for

[9] On March 24, 1977, the Muckleshoots also submitted a request for expedited consideration of the exceptions.

[10] Section 4(g) authorizes the Commission,

> "Upon its own motion to order an investigation of any occupancy of, or evidence intention to occupy, for the purpose of developing electric power, public lands, reservations, or streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States by any person, corporation, state or municipality and to issue such order as it may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water power resources of the region."

transmission into interstate commerce, because it is on a headwater of the navigable Puyallup River, and because Congress has asserted jurisdiction over the White River by authorizing the Mud Mountain Dam for flood control.[11]

18. The Muckleshoots and Interior contend that the White River Project cannot be operated and maintained without a Commission license because it utilizes surplus water from the government's Mud Mountain Dam.[12] Additionally, they contend that a license is required by *Taum Sauk*, notwithstanding *Farmington*, because the licensing standard (as distinguished from the filing standard) of Section 23(b) is unchanged from the pre-1935 Section 23, namely, projects which affect interstate or foreign commerce, and projects which affect public lands or reservations, and Puget Power has in fact filed an application for a license. And, they add, Puget Power generates and transmits electric energy in interstate commerce, and the White River Project adversely affects the Muckleshoot Indian Reservation. Finally, they contend that the Muckleshoots were historically "fish-eaters"; that the Muckleshoots have certain treaty and other off-reservation fishing rights;[13] that the term "reservations" is defined in Section 3(2) of the Federal Power Act to include "interests in lands owned by the United States, and . . . reserved . . . from private appropriation"; that Puget Power is prohibited by Section 4(e)[14] from locating any of the project works "upon any part of the . . . reservations of the United States" without obtaining a license; and, therefore, Puget Power's diversion facilities are located upon a "reservation" of the Muckleshoots—a reservation of sufficient water to sustain their fishery.

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[11] We might add that in enacting the Fishery Conservation and Management Act of 1976 which, among other matters, established a 200-mile offshore fishery conservation zone, Congress found that "the anadromous species which spawn in United States rivers or estuaries," among other fish species, constitute valuable and renewable natural resources. These fishery resources contribute to the food supply, economy, and health of the Nation and provide recreational opportunities." Anadromous species migrate through the White River to and from points upstream from Mud Mountain Dam.

[12] They are joined in this respect by the Departments.

[13] *United States* v. *Washington*, 520 F.2d 676 (CA9, 1975).

[14] Apparently they mean Section 23(b).

19. As was pointed out by the presiding judge, the criteria for determining the navigability of a waterway for jurisdictional purposes under the Federal Power Act were established by the Supreme Court in *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377 (1940), and succinctly summarized by the United States Court of Appeals for the Second Circuit in *Rochester Gas and Electric Corporation* v. *Federal Power Commission*, 334 F.2d 594 (1965), at page 596. By these criteria, a waterway is a navigable water if

> "(1) it *presently* is being used or is suitable for use, or
>
> (2) it has been used or was suitable for use in the *past*, or
>
> (3) it could be made suitable for use in the *future* by reasonable improvements."

In view of the substantial diversions of the flow of the White River by Puget Power for more than a half century, no party has offered evidence to show, or contends, that the relevant reach of the river is presently being used or is suitable for use for the transportation of persons or property in interstate or foreign commerce. Nor has any party offered evidence to show that it could be made suitable for such use in the future by reasonable expenditures. We will, therefore, limit our inquiry to whether the White River has been used or was suitable for use for the transportation of persons or property in interstate or foreign commerce at any time in the past. And, if so, it remains navigable today.[15]

NAVIGABILITY

20. The Commission staff, the Muckleshoots and Interior take exception to the presiding judge's conclusion that the affected reach of the White River is not one of the "navigable waters" of the United States within the meaning of Section 3(8) of the Federal Power Act.

21. In evaluating the nature and quantum of the evidence bearing upon whether the White River was at any time used or

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[15] "When once found to be navigable, a waterway remains so." *Appalachian, supra*, 311 U.S., at page 408.

suitable for use for the transportation of persons or property in interstate or foreign commerce, it is significant to note that settlement of the region under consideration did not begin until the 1850's, that the White River changed its course in 1906 and that Puget Power began to divert a substantial part of the river's flow shortly thereafter.[16] Our inquiry is, therefore, effectively limited to little more than a peek into some fifty to sixty years of the life of the river beginning more than a century ago. "Use of a stream long abandoned by water commerce is difficult to prove by abundant evidence."[17]

22. Certainly, there is evidence in the record to indicate that the White River was not navigable over the reach in question. In 1854 Lieutenant Richard Arnold investigated the area for a possible military road and reported, according to a later account, "that the White River was a raging torrent, fordable only during three months out of the year; that even then, the force of the current and the exceedingly rocky bed would make it both difficult and dangerous to cross with pack animals and immigrant stock." The same account reports surveyors' observations in 1867 that, "The [White] river is navigable for steamers of light draft below the mouth of the Green River. Above that point it is very rapid." And further surveyors' observations that the "White River was a fast torrent up to its confluence with the Green at Auburn and was not drivable above that point."[18] Furthermore, an 1862 letter to the Superintendent of Indian Affairs states, "Muckleshoot is some ten miles from the head of canoe navigation."[19] And,

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[16] "[A]bsence of use over long periods of years, because of changed conditions. . .does not affect the navigability of rivers. . . ." *Appalachian, supra,* 311 U.S., at page 409.

[17] *Appalachian, supra,* 311 U.S., at page 416.

[18] Some of the evidence indicates that the rivers in the region were blocked frequently by logs and other debris. For example, the same account explains, "River drives were possible only on a very limited basis in Washington because of the large size of the logs, small and jammed streams." But since permanent obstructions such as falls, shallows and rapids do not make waterways unsuitable for navigation within the meaning of Section 3(8), certainly transient obstructions such as log jams also would not render them unsuitable.

[19] The letter is discussed further, *infra.* With respect to canoe navigation, the record indicates that the Indians designed their canoes for specific uses and water conditions. Furthermore, the canoes on the White River apparently were not bark or skin covered frames, but relatively flat solid dug-outs ranging upwards of 40 feet which were either paddled or poled.

finally, the Supreme Court of Washington held in *Sumner Lumber & Shingle Co.* v. *Pacific Coast Power Co.*, 72 Wash. 631, 131 P. 220 (1913), 131 P., at page 224, that the White River "between the intake and tailrace of the appellant, is not a navigable or floatable stream."[20]

23. But, upon consideration of the entire record, including the record as augmented by the briefs on and opposing exceptions, we are strongly persuaded that the White River was suitable for the transportation of persons and property, and was so used, at least as far upstream as Puget Power's diversion dam at Buckley.

24. An 1865 publication which purports to have been "A Plain Statement of Things as they Exist" in the Washington Territory states,

> "Dwamish (Duwamish) river is formed by Black and White rivers, and discharges into Elliott's bay, navigable the entire length, twelve miles, and White river twenty miles further.... Puyallup river empties into the Inlet twenty miles south of the mouth of Dwamish (Duwamish) river, and is navigable nine miles. These comprise the streams west of the Cascades on which steamers do, or may run."[21]

Similarly, an 1877 publication of an address which was delivered at the Centennial Exposition in 1876 states, "By removing drifts the (Puyallup) river is navigable to the Stuck." And according to a 1964 anniversary edition of the Kent *News Journal*,[22] speaking of steamers,

> "Alvord's Landing in Kent was considered to be the upriver terminus for the river boats, but boats operated as far upriver as Brannon's Donation Claim near Christopher

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[20] The *Sumner Lumber* case is discussed further, beginning at Paragraph 29.

[21] This account would place the head of navigation upstream from Auburn.

[22] Kent, Washington, is on the reach of the Green River which was formerly known as the White River about five miles downstream from Auburn.

and occasionally as far up as the confluence of the Green and White rivers near the present location of Porter's Bridge in Auburn."

25. If steam vessels "occasionally" operated as far upstream as Auburn, it is reasonable to conclude that the White River was suitable for their use as well as for lesser craft at least to that point. Indeed, Louis Starr, a Muckleshoot Indian who was 75 years of age at the time of the hearing, testified that his father and at least one of his friends told him that the Indians carried freight by canoe from Seattle to Auburn.[23]

26. We conclude that the head of canoe navigation on the White River was no further downstream than Auburn, and in the light thereof the 1862 letter to the Superintendent of Indian Affairs takes on added significance: "Muckleshoot is some ten miles from the head of canoe navigation."[24] On the basis of maps in the record it appears that the Muckleshoot Indian Reservation extends from a point which is about a mile south of the former confluence of the White and Green Rivers and about a mile east of Auburn, southeast about six miles along the White River. Whether the author of the letter was referring to the Muckleshoot Indian Reservation or the Muckleshoot Prairie, ten miles downstream would place the head of canoe navigation below Auburn. It appears, therefore, that the head of canoe navigation was at least ten miles upstream, which would place it in the vicinity of Buckley if measured from the center of the Muckleshoot Indian Reservation and above Buckley if measured from the Muckleshoot Prairie.

27. The record indicates that Indian villages in the region were generally located on waterways because canoeing represented the Indians' principal means of transportation and, further, that there was an Indian village on Boise Creek near its

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[23] Such hearsay evidence has probative value and is admissible in administrative proceedings under the Federal Power Act. See the discussion of Section 308(b) in *Montana Power Co.* v. *Federal Power Commission*, 185 F.2d 491 (C.A.D.C., 1950), beginning on p. 497.

[24] There is testimony to the effect that the word "Muckleshoot", standing alone, was used by the writer to refer to the Muckleshoot Prairie, a small flat area east of the reservation.

mouth on the White River (upstream from Buckley). Whatever inferences the existence of that village may raise with respect to the use of the White River for transportation to a point near that village, Mr. Starr testified that the Indians took their canoes to a point about 15 miles above Buckley, near the confluence of the Greenwater River, to pick huckleberries and hunt. His testimony is coroborated by that of Maggie Barr, a Muckleshot Indian who was 79 years of age at the time of the hearing and whose father was a canoeman, who testified that the Indians canoed to the Greenwater River to fish and pick huckleberries, and that they traded some of the fish. Arthur Williams, who is half Muckleshoot and half Puyallup and was 60 years of age at the time of the hearing, testified that when he was a boy (in the early 1920's) he and others poled canoes up the White River to the Greenwater River to set fish weirs, and that they smoked some of the fish which they caught, and traded it at Dieringer.

28. Copies of about a dozen letters in the record dated from 1914 to 1917 requesting the permission of the United States Indian Service of the Department of the Interior to sell cedar shingle bolts[25] from the Muckleshoot Indian Reservation indicate that the White and Stuck Rivers were used to float shingle bolts to Sumner on the Stuck River at its mouth on the Puyallup River. Mr. Starr testified, in this connection,

> "[T]hey used to drive those shingle bolts down to Sumner from way up in the mountains. That's after they changed the river. That is where the mill was. The river used to be one steady stream of shingle bolts at those times. You couldn't see the end of them."

29. Turning to the *Sumner Lumber* case, *supra*, we would observe that the Supreme Court of Washington said, 131 P., at page 222,

> "To be navigable or floatable in law, the stream must possess such characteristic in its natural state. If artificial means or aids are necessary in making use of the stream to float timber, the stream is not floatable."

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[25] A shingle bolt is a quartered section of log about four feet six inches long.

In marked contradistinction, the Supreme Court of the United States said in *Appalachian, supra,* with respect to Section 3(8) of the Federal Power Act, 311 U.S., at page 407,

> "To appraise the evidence of navigability on the natural condition only of the waterway is erroneous. Its availability for navigation must also be considered. 'Natural and ordinary condition' refers to volume of water, the gradients and the regularity of the flow. A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken. Congress has recognized this in § 3 of the Water Power Act by defining 'navigable waters' as those 'which either in their natural or improved condition' are used or suitable for use." (Footnotes omitted.)

30. In *Sumner Lumber,* the Supreme Court of Washington in 1913 treated the White and Stuck Rivers as a single river and noted that there had been 18 drives of shingle bolts from September 1908, shortly before the mill in Sumner began operations, 14 from points below Puget Power's predecessor's diversion dam at Buckley, and 4 from points above that dam. The Supreme Court said that it was clear from the evidence that it would have been "impossible to drive these rivers without men and teams assisting in breaking up jams, opening up new channels, and keeping the bolts from lodging on the banks and bars . . . It is apparent that, if dependency was had upon the natural conditions of these streams, few, if any, shingle bolts would ever reach respondent's mill." And applying the law of Washington as set out in the preceding paragraph, the Supreme Court of that State concluded that the river was not navigable between Buckley and Dieringer.

31. The Muckleshoots and Interior attached an appendix to their brief on exceptions consisting of 27 transcript pages of portions of the testimony of 10 witnesses in the *Sumner Lumber* case, 12 duplicate photographs of a shingle bolt drive between Buckley and Dieringer in 1911 shortly before Puget Power's predecessor commenced operation of its White River Project, and a copy of a map showing the dates, locations and directions of those and other photographs. Puget Power countered in its

brief opposing exceptions, "While these attachments are not properly a part of the record in this case, it is important to respond to this extrarecord [sic] material to insure that the Commission has a fuller understanding of the (Muckleshoots' and Interior's) submission." And Puget Power attached its own appendix to its brief opposing exceptions consisting of 6 more pages of transcript and 5 more duplicate photographs, arguing that its appendix shows that the reach of the White River in question was not used to float sawlogs, but only shingle bolts.

32. The record of the *Sumner Lumber* case is, perhaps, the most reliable existing corroborative evidence of the historic use of the White River for the flotation of shingle bolts. It is evidence given under oath in about 1912 in a lawsuit involving the same issue as is involved herein, namely, the navigability of the White River from Buckley downstream, and at least some of the witnesses whose testimony has been submitted herein appear to have testified for Puget Power's predecessor. The portions of that record which were attached to the Muckleshoots' and Interior's brief, as well as Puget Power's brief, are portions of an official court record which lack only the testimony of their custodian that they are what they purport to be. None of the parties has raised any objection to their authenticity and, therefore, we will consider the submissions as part of the record.[26]

33. Whatever the frailties of the testimony of the Muckleshoot witnesses, as discussed in the Initial Decision, their testimony is corroborated fully by the *Sumner Lumber* record, at least insofar as concerns the historic use of the White River for the flotation of shingle bolts. The excerpts of the testimony of the 10 witnesses established that the White River was in fact a highway of shingle bolt commerce from points both above and below Buckley during the last decade of the nineteenth century and the first decade of the twentieth century, both

[26] Additionally, they are admissible under an exception to the hearsay rule as an historic public document. See Footnote 23, *supra*.

before and after the White River changed its course.[27] There were several mills along the White River in addition to the one at Sumner, including one on the Muckleshoot Indian Reservation, one just below the diversion dam at Buckley and one above the site of that dam, and the White River was the most economical method for moving shingle bolts to those mills. Furthermore, the bolts were not driven during freshets, but during periods of normal flows. And the photographs of a nineteen day drive in July and August 1911 show hollow wooden canoes, presumably of Indian origin, being used for driving the shingle bolts.

34. In *Economy Light & Power Company* v. *United States*, 256 U.S. 113 (1921), the Supreme Court held that the Desplaines River in Illinois was navigable even though it had not been used for commerce for almost one hundred years, stating, 256 U.S., at page 122:

> "Navigability, in the sense of the law, is not destroyed because the watercourse is interrupted by occasional natural obstructions or portages; nor need the navigation be open at all seasons of the year, or at all stages of the water.
>
> * * *
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> "It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use."

The difference between the flotation of sawlogs and the flotation of shingle bolts goes to the manner of the use of a river rather than to its capability of use by the public as a highway

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[27] One witness, a Mr. Dieringer, testified that he and another individual operated a rented shingle mill above Buckley during the summer of 1892 and the following winter, and that he personally drove shingle bolts from Mud Mountain down the White River to that mill. Another witness, a Mr. Rawls, testified that it takes ten to eleven inches of water to drive shingle bolts and that he had just completed a drive of 1,600 to 1,800 cords. Three witnesses testified to the use of the White River for shingle bolt drives for 16 to 17, 17 to 18 and 18 to 19 years, respectively, and three others testified to its use for such drives for 20 or more years.

for transportation and commerce. So, too, the quantum of Indian canoe traffic would go to the extent of its use rather than to its capability of use.

35. In recent years the flotation of logs has been given increasing, if not dominent, importance in determining the navigability of waterways for purposes of the Federal Power Act. In *Wisconsin Public Service Commission* v. *Federal Power Commission*, 147 F.2d 743 (1945), the United States Court of Appeals for the Seventh Circuit affirmed a Commission decision that the upper reaches of the Wisconsin River were and are navigable waters of the United States because of their long, regular commercially successful use in the transportation of logs and rafts.[28] The same court, in *State of Wisconsin* v. *Federal Power Commission*, 214 F.2d 334 (1954), affirmed another Commission decision that the East Fork of the Chippewa River was and is navigable because of logging operations. And the United States Court of Appeals for the Second Circuit, in *The Connecticut Light and Power Co.* v. *Federal Power Commission*, No. 76-4212, decided June 27, 1977, appears to have given great weight to the flotation of logs in affirming still another Commission decision that the Housatonic River was and is navigable.

36. Upon reviewing the entire record, we are strongly persuaded that although the gradient of the White River is steep from Buckley downstream to a point several miles above Dieringer, the natural flows of the White River in that reach are sufficient both in volume and regularity to have supported its relatively simple use for the transportation of persons and property. We are strongly persuaded that the White River was in fact used by Indians at least as far upstream as the site of Puget Power's diversion dam at Buckley for transporting themselves and their property, and we so find. And there can be no

[28] The Seventh Circuit rejected the contention that the flotations in question were intrastate in character, noting that the river in question "constitutes a continuous highway over which commerce is or may be carried on with other states. So too, although the evidence herein establishes flotations only as far as Seattle before 1906 and only as far as Sumner after 1906, the White-Duwamish and the White-Stuck-Puyallup river systems were and are continuous highways of both interstate and foreign commerce.

question that the relevant reach of the White River was used for more than twenty years for the downstream flotation of shingle bolts from points both above and below Buckley. The White River unquestionably was and is a navigable water of the United States within the meaning of Section 3(8) of the Federal Power Act from both of its mouths at least to the vicinity of Puget Power's diversion dam at Buckley and, therefore, the Initial Decision to the contrary should be reversed.

REPLY BRIEF ON EXCEPTIONS

37. On September 20, 1976, the Muckleshoots and Interior filed a motion for leave to file a "Reply Brief on Exceptions" together with the brief, and on October 7, 1976, Puget Power filed a response in opposition. We will treat the motion as one to lodge a 1976 Supreme Court decision, although a copy of that decision is not physically attached, and grant it to that extent.[29] But we will deny the motion in all other respects since the brief would make further arguments on exception and is not authorized by 18 CFR § 1.31.

INTERVENTION

38. On October 14, 1976, the Department of Ecology of the State of Washington (Ecology) filed a petition for permission to intervene, stating that it is the agency which is responsible for administering Washington's water management programs and that it is expressly empowered to present the views and recommendations of the State of Washington with respect to projects relating to any waters located in the State of Washington, including any Federal license proposal. Ecology states that on July 15, 1976, two young girls drowned in the Stuck River in a surge of water which resulted from the combined operation of the Corps' Mud Mountain Dam and Puget Power's diversion dam and intake, that that tragedy has

[29] The decision in question is relevant to one of the theories of jurisdiction which is not addressed herein.

raised questions concerning the design and operation of both dams,[30] and that Ecology's interest is to assure "that the design and operational procedures relating to said dam(s) will not pose a threat to the safety of humans or their property." Finally, Ecology states that it does not wish to present additional evidence regarding jurisdiction and that it accepts the record as it is.

39. Puget Power, on October 22, 1976, filed an answer opposing Ecology's petition on the ground that it was filed more than nine years too late, and on the further ground that Section 308(a) of the Federal Power Act authorizes States, but not their agencies, to intervene: "It necessarily follows that when the Commission earlier granted intervention to the Washington State Department of Fisheries and (Department of) Game, the party that was being allowed to intervene was the State of Washington and that those two departments were merely its representatives." Accordingly, Puget Power would have Ecology coordinate its views with those of the Departments but would not permit it to intervene as a separate party. The Muckleshoots and Interior, on October 26, 1977, indicated that

[30] Ecology attached to its petition a copy of a document dated August 1976 and entitled, "White River Investigation And Analysis of Other Controlled Rivers". The investigation therein of the drowning indicates that the Corps began to release a small amount of storage from the Mud Mountain impoundment for a routine cleaning of sediment and debris, increasing the flow of the White River from 1,850 cfs to 2,636 cfs within a 10-minute span; that the resulting turbidity of the river caused Puget Power to close its diversion intake to protect its system, thereby redirecting the flow down the White River, and to remove the flashboards from its diversion dam, thereby releasing seven feet (in depth) of pondage, both within a 15-minute span; and that the resulting surge later transformed the Stuck River from a relative trickle into a rapid river in a matter of three to five minutes when it reached its victims some two miles upstream from the Dieringer tailrace. And Ecology concluded, among other matters, "The design, construction, and operation of the dam operated by Puget Power does not enable the operators opportunity to make controlled gradual changes in the rate of flow downstream under varied conditions."

they did not object to Ecology's proposed intervention.[31] And Ecology, on November 4, 1976, filed a response to Puget Power's answer.[32]

40. Ecology asserts in its response that 18 CFR § 1.1(f)(1) defines the term "person" to include state agencies, and that 18 CFR § 1.89(b) authorizes the filing of a petition to intervene by any "person" claiming an interest of such nature that intervention is appropriate to the administration of the Federal Power Act. We agree with Ecology and would note that the Commission has permitted state agencies to participate in administrative proceedings as separate parties on numerous occasions. We find that the area of concern of the Department of Ecology may not be adequately represented by the Departments of Fish and Game and, therefore, that Ecology should be permitted to intervene as a separate party.

The Commission further finds:

(1) Puget Sound Power & Light Company (Puget Power) is a corporation which is organized under the laws of the State of Washington.

(2) Puget Power owns, operates and maintains a water power development, known as the White River Project, in Pierce County, Washington, which project has an installed capacity of 63,400 KW, is connected to Puget Power's interconnected transmission system and generates electricity for transmission in interstate commerce.

(3) Puget Power operates and maintains a diversion dam in and across the White River, a navigable water of the United States, at or near Buckley, Washington, together with water conduits, reservoirs, a power house and other works of its White River Project incidental to the development of electric power across, along or in the White River, without having an existing right-of-way granted

[31] They attached to their filing a copy of an Agreement dated September 3, 1976, by which Puget Power and the Corps formulated certain operating procedures to minimize rapid fluctuations in river flows.

[32] The response is not authorized by 18 CFR § 1.8, but will be considered in the absence of objections.

prior to June 10, 1920, or a license granted pursuant to the Federal Power Act, in violation of Section 23(b) of the Federal Power Act.

(4) The Initial Decision holding that the relevant reach of the White River is not a navigable water of the United States should be reversed.

(5) Puget Power's request for permission to withdraw its license application for its White River Project should be denied, and Puget Power should be directed to refile its application with current information.

(6) The motion of the Muckleshoot Indian Tribe and the Secretary of the Interior for leave to file a "Reply Brief on Exceptions" should be granted insofar as it would lodge a recent court decision, and should be denied in all other respects.

(7) Participation in this proceeding by the Department of Ecology of the State of Washington may be in the public interest.

(8) The issues with respect to jurisdiction have been adequately briefed and, therefore, the motion of the Muckleshoot Indian Tribe and the Secretary of the Interior for leave to present oral argument should be denied.

The Commission orders:

(A) The Initial Decision issued March 3, 1976, holding that the relevant reach of the White River is not a navigable water of the United States, is reversed, and Puget Sound Power & Light Company's request for permission to withdraw its license application for its White River Project, Commission No. 2494, is denied.

(B) Within 60 days after issuance of this opinion and order, Puget Sound Power and Light Company shall refile its application for a license for its White River Project, Commission No. 2494, to provide current information as in the case of a new application for license. Such refiled application shall be self contained.

(C) The motion of the Muckleshoot Indian Tribe and the Secretary of the Interior for leave to file a "Reply Brief on Exceptions" is granted insofar as it would lodge a recent court decision, and is denied in all other respects.

(D) The Department of Ecology of the State of Washington is hereby permitted to intervene in this proceeding subject to the Rules and Regulations of the Commission; *Provided, however,* that participation by the said Department of Ecology shall be limited to matters affecting certain rights and interests specifically set forth in its petition to intervene and *Provided, further,* that the admission of the said Department of Ecology shall not be construed as recognition by the Commission that the intervenor might be aggrieved because of any order or orders of the Commission entered in this proceeding.

(E) The motion of the Muckleshoot Indian Tribe and the Secretary of the Interior for leave to present oral argument is denied.

(F) The exceptions with respect to all jurisdictional issues other than the navigability of the White River are not reached and are, therefore, not decided.

Appendix D

PUGET SOUND POWER AND LIGHT COMPANY—Project No. 2494

OPINION NO. 2-A

OPINION AND ORDER DENYING REHEARING
(Issued: August 9, 1978)

Before Commissioners: CHARLES B. CURTIS, Chairman; DON S. SMITH, GEORGIANA SHELDON, MATTHEW HOLDEN, JR., and GEORGE R. HALL.

Digest Section	Syllabus
2322.5	The Commission denies rehearing of Opinion No. 2 in which it found that a power company's river project is a jurisdictional water power project.

1. On November 25, 1977, Puget Sound Power and Light Company (Puget Power) filed an application pursuant to Section 313(a) of the Federal Power Act and § 1.34 the Commission's Rules of Practice and Procedure for rehearing of Opinion No. 2, issued October 28, 1977, in which the Commission found that Puget Power's White River Project is a jurisdictional water power project. On November 28, 1977, the Muckleshoot Indian Tribe (the Muckleshoots) and the Secretary of the Interior (Interior) filed a joint application for rehearing. The Commission, on December 27, 1977, granted rehearing for the limited purpose of further consideration.

2. Puget Power contends that we erred, first, by finding that the relevant reach of the White River is one of the "navigable waters" of the United States within the meaning of Section 3(8) of the Federal Power Act, and second, by applying Section 23(b) of the Federal Power Act to the White River Project which was constructed prior to its enactment and is situated on a non-navigable water.[1] Puget Power, the

[1] We understand Puget Power's contention to be that the outcome of this proceeding should be governed by *Farmington River Power Company* v. *Federal Power Commission*, 455 F.2d 86 (CA2, 1972).

Muckleshoots and Interior contend that we erred by addressing only one of the several theories of jurisdiction which were advocated at the hearing and argued in the briefs.

3. In 1912 Puget Power's predecessor, Pacific Coast Power Company, completed and placed into operation the first two generating units of the White River Project, and began to divert the waters of the White River; and in 1913 the Supreme Court of Washington held in *Sumner Lumber & Shingle Co.* v. *Pacific Coast Power Co.,* 131 P. 220, that the White River was not navigable between the diversion dam at Buckley and the powerhouse at Dieringer. Puget Power asserts in substance that we erred in reaching the opposite conclusion some 64 years later, relying in part upon portions of the same factual record as was considered by the Supreme Court of Washington.

4. We do not agree with Puget Power that the Washington and Federal tests of navigability "were exactly the same" prior to the time Congress defined the term "navigable waters" in Section 3 of the Federal Water Power Act of 1920 and the Supreme Court interpreted that term in *United States* v. *Appalachian Electric Power Co.,* 311 U.S. 377 (1940).[2] Nor do we agree with Puget Power that the Supreme Court of Washington reached its decision "after observing the demeanor

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[2] The Supreme Court of Washington said in *Sumner Lumber,*

> To be navigable or floatable in law, the stream must possess such characteristic in its natural state. If artifical means or aids are necessary in making use of the stream to float timber, the stream is not floatable.

But the Supreme Court of the United States said in *The Daniel Ball,* 77 U.S. 557, 563 (1871),

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

The use or susceptibility of use of rivers as highways for commerce "in their ordinary condition" does not preclude the utilization of aids such as those which were used to help move shingle bolts down the White River. Certainly, one could not rule out a wagon trail as being a highway for commerce simply because ferries or bridges are required to help move vehicles, or even animals alone. In 1913 the Washington test precluded artificial aids whereas the Federal test included the susceptibility concept which later evolved through *Appalachian* into the current suitability standard.

of the witnesses".[3] Today, we are bound to follow *Appalachian* and its subsequent interpretations and to apply a test of navigability which differs materially from the one utilized by the Supreme Court of Washington. The portions of the *Sumner Lumber* record which are before us establish persuasively that the White River was in fact a highway for shingle bolt commerce even though, as the Washington courts found, it was customary to go upon the banks or shoulders of that highway to keep that commerce moving.

5. We agree with Puget Power that the author of the statement, "Muckleshoot is some ten miles from the head of canoe navigation", was probably referring to the Muckleshoot Indian Reservation rather than the Muckleshoot Prairie. Opinion No. 2 does not draw an inference to the contrary, but merely calls attention to the testimony that the name "Muckleshoot", standing alone, might refer to the Prairie. In any event, we read the statement in context as saying, not that the Muckleshoot Indian Reservation was *inaccessible* by land or water, as Puget Power argues, but simply that it wasn't a sufficiently important location to warrant further expenditures because canoe navigation was limited to ten miles upstream and the wagon road was in poor condition. We believe that it is illogical to place the head of canoe navigation downstream from Auburn, as Puget Power contends, since steam vessels were able to reach Auburn.

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[3] *Sumner Lumber* involved an appeal from the Superior Court of Pierce County in which transcribed rather than live testimony was considered by the Supreme Court of Washington. As appears from the face of that opinion, 131 P., at page 222, the Superior Court of Pierce County observed the demeanor of the witnesses and reached the opposite conclusion:

> There is much testimony in the record as to whether it is possible to make a drive without the use of the banks . . . and, while there is no dispute as to the fact that no drive has been made without the use of the banks, the lower court seemed impressed with the opinions of witnesses that it could be done, and found "that in driving shingle bolts down the said rivers to plaintiff's mill drivers have been accustomed to frequently go upon the banks of the streams above the line of high-water mark, but that it is not necessary so to do, although it is necessary in driving to go upon the bed of the streams." Whether or not a drive could be made without the use of the banks, we are unable to say . . . It is apparent that, if dependency was had upon the natural condition of these streams, few, if any, shingle bolts would ever reach respondent's mill.

6. We also agree with Puget Power that the Administrative Procedure Act, 5 U.S.C. § 557(c), and the Commission's Rules of Practice and Procedure, 18 CFR § 1.30(g), require that all decisions include a statement of findings and conclusions, as well as the reasons or basis therefor, upon all material *issues* of law presented on the record. When we decide, however, that a water power project is jurisdictional under one of several legal theories which are advocated by the parties, the other theories cease to be material to that issue and need not be addressed in our decision.

We based our decision on the navigability of the White River because that was the principal jurisdictional theory developed in the record and argued in the briefs, and because there is a substantial body of case law on the subject. In finding jurisdiction on the primary theory of navigability, it is not necessary to reach the secondary and independent bases advocated by the parties.[4] Nor do the Administrative Procedure Act and the Commission's Rules of Practice and Procedure require discussions of theories which are not in fact reached and decided.[5] But if our decision on the primary theory of navigability is reversed and the other theories of jurisdiction are reached, we would request a remand to give them decisional consideration.[6]

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[4] *The Connecticut Light and Power Co.* v. *Federal Power Commission*, 557 F.2d 349 (CA2, 1977).

[5] "The second alleged procedural irregularity is the Commission's failure to make findings and conclusions upon 'other issues' even though it determined that the application must be denied on the grounds that appellant was financially unqualified. Section 8(b) of the Administrative Procedure Act [now 5 U.S.C. § 557(c)], upon which appellant relies, contains no such requirement. An agency, like a court, need not decide questions which are not relevant to its decision." (Footnote omitted.) *Deep South Broadcasting Company* v. *Federal Communications Commission*, 278 F.2d 264, 266 (CADC, 1960).

[6] All of the other potential bases of jurisdiction involve legal theories which lack the body of case law associated with navigability. In addition, it appears that the contention that the White River Project utilizes surplus water or water power from the Mud Mountain Dam was not developed adequately in the record and, as a result, that theory of jurisdiction could have been rejected for lack of proof, as distinguished from the merits. Alternatively, the record could have been remanded for further development of that theory, thereby consuming additional time without producing a meaningful result if jurisdiction premised on the navigability of the White River is sustained.

The Commission further finds:

The assignments of error and grounds for rehearing set forth in the applications for rehearing filed November 25 and 28, 1977, respectively, by Puget Sound Power and Light Company, and the Muckleshoot Indian Tribe and the Secretary of the Interior, present no facts or legal principles which would warrant any change in or modification of Opinion No. 2 and order issued October 28, 1977, except as that Opinion and order is clarified herein.

The Commission orders:

The applications for rehearing of Opinion No. 2 filed by Puget Sound Power and Light Company on November 25, 1977, and the Muckleshoot Indian Tribe and the Secretary of the Interior on November 28, 1977, are denied.

Appendix E

Article I, Section 8 of the United States Constitution provides in full:

SECTION 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Appendix F

Section 23(b) of the Federal Power Act (16 U.S.C. § 817) provides in full:

> **Projects not affecting navigable waters; necessity for Federal license**
>
> It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this chapter. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter. If the Commission shall not so find, and if no public lands or reservations are affected, permission is granted to construct such dam or other project works in such stream upon compliance with State laws.

Appendix G

Section 3(8) of the Federal Power Act (16 U.S.C. § 796(8)) provides in full:

Definitions

The words defined in this section shall have the following meanings for purposes of this chapter, to wit:

. . .

(8) "navigable waters" means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority.

Section 4(e) of the Federal Power Act (16 U.S.C. § 797(e)) provides in full:

General Powers of Commission

The Commission is authorized and empowered—

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided,* That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations: *Provided further,* That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or

waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further,* That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further,* That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection.

Appendix

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81-235

Office-Supreme Court, U.S.
FILED
AUG 1 1981
ALEXANDER L. STEVAS
CLERK

No. 81-

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

PUGET SOUND POWER & LIGHT COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

and

WASHINGTON STATE DEPARTMENT OF FISHERIES, WASHINGTON STATE DEPARTMENT OF GAME, MUCKLESHOOT INDIAN TRIBE, AND SECRETARY OF THE INTERIOR,
Intervenors.

APPENDIX

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Appendix A

STEVEN C. MARSHALL, Perkins, Coie, Stone, Olsen & Williams, Seattle, Wash., argued for petitioner; DOUGLAS P. BEIGHLE, Seattle, Wash., on brief.

DONALD B. MILLER, Boulder, Colo. argued for respondent; MCNEIL WATKINS II, Washington, D.C., on brief.

ON PETITION TO REVIEW ORDERS OF THE FEDERAL ENERGY REGULATORY COMMISSION.

Before VAN DUSEN,* ANDERSON and BOOCHEVER, Circuit Judges.

J. BLAINE ANDERSON, Circuit Judge:

We have before us a petition for review filed by Puget Sound Power & Light Company (Puget) challenging an order entered by the Federal Energy Regulatory Commission (Commission)[1] directing Puget to refile its application for a license to operate its hydroelectric generating project, located on the White River in the State of Washington. The Commission reversed the findings of the Administrative Law Judge (ALJ)[2] and determined that Puget's White River Project is located on "navigable waters," as that term is defined by section 3(8) of the Federal Power Act, 16 U.S.C. § 796(8), thus conferring licensing jurisdiction upon the Commission in accordance with sections 4(e) and 23(b) of the Act, 16 U.S.C. §§ 797(e), 817. Jurisdiction is conferred upon this court by section 313(b) of the Act, 16 U.S.C. § 825(b), and we now affirm.

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* The Honorable Francis L. Van Dusen, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

[1] On October 1, 1977, the Federal Power Commission was replaced by the Federal Energy Regulatory Commission pursuant to the provisions of the Department of Energy Organization Act, 42 U.S.C. §§ 7101, *et seq.*, and Executive Order No. 12009, 42 Fed.Reg. 46267 (September 15, 1977). Many of the FPC's regulatory responsibilities under the Federal Power Act, including all those relevant to this case, were transferred to the FERC.

[2] The ALJ's opinion appears at 13 Fed.Power Serv. 5-352 (decided March 3, 1976). The FERC's opinion and order is reported at 13 Fed.Power Serv. 5-332 (issued October 28, 1977), and its opinion and order denying rehearing can be found at 15 Fed.Power Serv. 5-1069 (issued August 9, 1978).

Puget does not contend that the Commission applied an erroneous test for determining the White River's navigability. Section 3(8) of the Federal Power Act defines "navigable waters" as:

> "... those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority."

16 U.S.C. § 796(8). This definition parallels the language of the cases that declare the authority of the United States, arising from the commerce clause of the Constitution, over its waters which are capable of use as interstate highways. See *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 61 S.Ct. 291, 85 L.Ed. 243 (1940); *United States* v. *Utah*, 283 U.S. 64, 51 S.Ct. 438, 75 L.Ed. 844 (1931); *Economy Light & Power Co.* v. *United States*, 256 U.S. 113, 41 S.Ct. 409, 65 L.Ed. 847 (1921); *The Montello*, 20 Wall 430, 87 U.S. 430, 22 L.Ed. 391 (1874); *The Daniel Ball*, 10 Wall 557, 77 U.S. 557, 19 L.Ed. 999 (1871).

[1,2] In this case, no evidence was offered to establish either that the relevant stretch of the White River is presently navigable, or that it could be made navigable through reasonable improvements. *Appalachian, supra,* 311 U.S. at 407, 61 S.Ct. at 299. Rather, all of the evidence concerned the historic use of the river prior to the time when the hydroelectric project commenced operations in 1911, and thus began diverting a substantial portion of the river's flow. This approach is not fatal to a determination of navigability for "when once found to be navigable, a waterway remains so." *Id.* at 408, 61 S.Ct. at

299. We are satisfied that both the ALJ and the Commission applied the proper test: To find navigability, the evidence must establish that in the past the White River was either used, or was susceptible of being used, in its natural and ordinary condition as a highway for useful commerce. *See Rochester Gas and Electric Corp.* v. *Federal Power Commission,* 344 F.2d 594, 596 (2d Cir.), *cert denied,* 382 U.S. 832, 86 S.Ct. 72, 15 L.Ed.2d 75 (1965). If the waterway is merely capable of exceptional transportation during periods of high water, it is not navigable. "The mere fact that logs, poles, and rafts are floated down a stream occasionally and in times of high water does not make it a navigable river." *United States* v. *Rio Grande Dam & Irrigation Co.,* 174 U.S. 690, 698, 19 S.Ct. 770, 773, 43 L.Ed. 1136 (1899).

The only remaining question is whether the Commission's finding of navigability is supported by substantial evidence. The Commission's finding as to the fact of navigability, if supported by substantial evidence, is conclusive. 16 U.S.C. § 825*l*(b); *Conn. Light & Power Co.* v. *Federal Power Commission,* 557 F.2d 349, 354 (2d Cir. 1977); *Rochester, supra,* 344 F.2d at 596. Puget raises various challenges to the sufficiency of the evidence in this case. We think they must be rejected.

[3] In 1913, the Washington Supreme Court decided that the White River was not navigable. *Sumner Lumber & Shingle Co.* v. *Pacific Coast Power Co.,* 72 Wash. 631, 131 P. 220 (1913). In that case, Sumner Lumber & Shingle Company brought suit against the Pacific Coast Power Company, Puget's predecessor in interest. The lumber company, which operated a shingle mill downstream from the subject power plant, sought to enjoin the power company's diversion from the White River so as to protect its avenue of getting shingle bolts[3] from up in the wooded mountains downstream to its mill. The company alleged that without the injunction, "its business as a booming company" would be destroyed. *Id.* at 222. The court ruled against the lumber company and held that the White River was not navigable at the precise location now under consideration in this case. Puget argues that the Commission failed to give

[3] A shingle bolt is a quartered section of a log, normally cedar, and is about four feet six inches in length. They are used for making shingles.

sufficient weight to the Washington Supreme Court's assessment of the facts in the *Sumner Lumber* case. The ALJ concluded that, "Ignoring a local court's evaluation in 1913 of almost the same facts urged 70 years later borders on the absurd." ALJ's Opinion, 3 Fed.Power Serv. 5-352, at 5-360. Had the Washington Supreme Court applied the same test of navigability that the Commission was obligated to follow in this case, we would be inclined to agree. However, we are convinced that it did not, and a holding under state law is not determinative of navigability under Federal law. *Brewer-Elliot Oil & Gas Co.* v. *United States*, 260 U.S. 77, 87, 43 S.Ct. 60, 64, 67 L.Ed. 140 (1922); *Wisconsin* v. *Federal Power Commission*, 214 F.2d 334, 336-337 (7th Cir.) *cert. denied*, 348 U.S. 883, 75 S.Ct. 124, 99 L.Ed. 694(1954).

[4] While the holding in *Sumner Lumber* is of little consequence to the immediate action, the Commission found that the record from that case provided valuable evidence of the historic use of the White River for the flotation of shingle bolts. In their brief to the Commission, the Muckleshoot Indian Tribe and the Secretary of Interior included an appendix containing portions of that record. Selected portions of the testimonies of ten witnesses and twelve duplicate photographs of a shingle bolt drive were included. Whatever objections Puget might have had concerning the consideration of this documentation were lost when it chose to provide the Commission with portions of the record favorable to its position. We think the Commission's consideration of this material was proper and Puget has not contended otherwise. See 16 U.S.C. § 825g(b); *Conn. Light and Power Co., supra*, 557 F.2d at 356; *Montana Power Co.* v. *Federal Power Commission*, 185 F.2d 491, 498 (D.C.Cir. 1950), *cert. denied*, 340 U.S. 947, 71 S.Ct. 532, 95 L.Ed. 683 (1951).

[5] On the evidence in the record before it, as augmented by portions of the record from the *Sumner Lumber* case, the Commission concluded that the White River was navigable. The basis for that decision was the historic use of the river prior to 1911. It was at that time that Puget's predecessor in interest began diverting a substantial portion of the river's flow. The

Commission found that the White River had supported navigation by light craft, primarily Indian canoes, and that shingle bolts had been transported downstream for more than twenty years. The shingle bolts were driven on the river at all times of the year *except* at times of high water during the annual freshets. The bolts required nearly constant handling by the drivers to break up jams, free those bolts that were lodged on the banks and shallow areas, and direct them down the main channel of the river. Yet, the drivers did not consider this work difficult, and there was testimony to the effect that it was the most, if not the only, economically feasible method at that time of transporting the bolts to the lumber mills. Our review of the record reveals that the Commission's findings are supported by the evidence.

Puget argues that the evidence of navigation by canoes is insubstantial and cannot establish navigability. Be that as it may, nevertheless, the evidence is relevant. The "personal or private use by boats" may demonstrate "the availability of the stream for the simpler types of commercial navigation." *Appalachian, supra,* 311 U.S. at 416, 61 S.Ct. at 303; *United States* v. *Utah, supra,* 283 U.S. at 82, 51 S.Ct. at 443. However, we are of the opinion that the river's navigable character must rest upon the evidence of the downstream flotation of shingle bolts. We therefore focus our attention of the evidence and arguments relating thereto.

Puget contends that finding navigability based on the flotation of wood the size of single bolts would drastically expand the existing law of navigability. The argument rests upon a misconception of the law. It is not the size of articles transported in commerce that establishes the navigable character of a waterway. Navigability depends upon the stream's usefulness as a transportation mechanism for commerce. "It is obvious that the uses to which the streams may be put vary from the carriage of ocean liners to the floating out of logs; that the density of traffic varies equally widely from the busy harbors of the seacoast to the sparsely settled regions of the Western mountains. The tests as to navigability must take these variations into consideration." *Appalachian, supra,* 311 U.S. at

405-406, 61 S.Ct. at 298. During the relevant period of Washington State's history, shingle bolts were as valuable a commodity as other timber products. The Washington Supreme Court so held:

> "... while a single shingle bolt contains but a small amount of timber compared with a saw log, yet in the aggregate timber in that form in this locality is relatively of equal commercial value with saw logs, and its carriage to market is perhaps as important to the timber industry of this state as that of saw logs. Elochoman creek was declared to be navigable for the reason that it furnishes a natural highway for the product of the great logging industry in this state, and Wood's creek should also be held to be navigable because it furnishes a similar highway for the product of another branch of the same industry... The reasons leading to the holding in this state, and others where the timber industry is important, that streams which are navigable in fact for the floatage of timber to market shall be public highways for that purpose, are founded upon commercial convenience and necessity because of the environment of the industry."

Monroe Mill Co. v. *Menzel*, 35 Wash. 487, 77 P. 813, 815 (1904). Clearly, shingle-bolt driving was a commercial use of the White River in the constitutional sense.

Shingle bolts were not driven on the White River without difficulty. Nor was the use of the river extensive, or long and continuous. These conditions do not preclude navigability. The language in two Supreme Court decisions is particularly fitting:

> "The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway... The vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful

> commerce. If this be so, the river is navigable in fact, although its navigation may be encompassed with difficulties by reason of natural barriers, such as rapids and sandbars."

The *Montello, supra,* 20 Wall at 441-443, 87 U.S. at 441-443.

> "[It is not] necessary for navigability that the use should be continuous. The character of the region, its products and the difficulties or dangers of the navigation influence the regularity and extent of the use. Small traffic compared to the available commerce of the region is sufficient. Even absence of use over long periods of years, because of changed conditions, the coming of the railroad or improved highways does not affect the navigability of rivers in the constitutional sense."

Appalachian, supra, 311 U.S. at 409-410, 61 S.Ct. at 300.

The evidence in this case is not overwhelming, but the Supreme Court has noted that, "Use of a stream long abandoned by water commerce is difficult to prove by abundant evidence." *Appalachian, supra,* 311 U.S. at 416, 61 S.Ct. at 303. In analyzing the quantum of evidence necessary to support a finding of navigability, we must take "due account of the changes and complexities in the circumstances of a river." *Id.* at 404, 61 S.Ct. at 297. In this case, the settlement of the region under consideration did not begin until the 1850's, the course of the river changed in 1906, and in 1911, Puget's predecessor in interest commenced operation of the power project. Two years later, the Washington Supreme Court rendered its decision in *Sumner Lumber, supra.* The change in the river's course and the commencement of operation of the power project effectively terminated shingle-bolt driving on the relevant stretch of the White River.

In short, we conclude that the Commission's determination of navigability is supported by substantial evidence. Accordingly, the decision and orders of the Commission are

AFFIRMED.

Appendix B

PRESIDING ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION FINDING NO JURISDICTION (March 3, 1976)

APPEARANCES

DOUGLAS P. BEIGHLE, WILLIAM S. WEAVER and JOHN C. MASON for Puget Sound Power and Light Company

JOSEPH L. CONIFF, JR., for Washington Department of Game and Washington Department of Fisheries

CHARLES E. O'CONNELL, JR., for The Secretary of the Interior on behalf of the Muckleshoot Indian Tribe

L. GRAEME BELL, III, THOMAS L. SMITHSON and ALEXANDRA HARMON for the Muckleshoot Indian Tribe

JOHN GOSSEL and LINDA L. LEE for the Staff of the Federal Power Commission

LITT, Presiding Administrative Law Judge:

I

PROCEDURAL BACKGROUND

By its order entered November 20, 1973, the Commission set for hearing the application of Puget Sound Power and Light Company (Puget) filed November 20, 1964, seeking either a disclaimer of jurisdiction or, in the alternative, for a license for its White River Project No. 2494. For 64 years Puget has steadfastly maintained that its project is not jurisdictional, but it filed its application in response to persistent Commission cajoling. Subsequent to its filing, the jurisdiction question appeared to be decided against Puget when the Supreme Court in *F.P.C.* v. *Union Electric Company*, 381 U.S. 90 (1965), also known as *Taum Sauk*, held that the Federal Power Commission has licensing authority over a project whose generated energy is transmitted in interstate commerce, even if the project is located

on a non-navigable stream. However, in *The Farmington River Power Company* v. *F.P.C.*, 455 F.2d 86 (2d Cir. 1972) the Second Circuit concluded that a project located on a non-navigable stream which generates energy transmitted in interstate commerce and which has undergone no post-1935 construction—such as this Project—does not fall within the 1935 amendment of Section 23(b) of the Federal Power Act. Based on this last court action, Puget filed, on January 15, 1973, an application for withdrawal of its licensing application. The original question of jurisdiction, as focused by the application for withdrawal, was set by the Commission for hearing.

Hearings were held in Seattle, Washington, on July 30 and 31, 1974, at which Puget, the Washington Departments of Game and Fisheries (Fisheries), the Secretary of the Interior, the Muckleshoot Indian Tribe,[1] and the Commission Staff participated. Initial and reply briefs were filed by each of the aforementioned parties.

II

GENERAL FACTS

Puget's White River Project is a hydroelectric generating facility located on the upper White River, in Pierce County, Washington (see map—Appendix A). The White River is a glacial stream fed by ice and snow on Mount Rainier. The project consists of a diversion facility at Buckley, Washington, which diverts a portion of the White River into a timber flume approximately 5,000 feet long, discharging in turn into a series of settling basins which cover approximately two miles. From the settling basins, the water enters an unlined canal and then a timber-lined canal until it enters Lake Tapps, approximately two miles distant. From Lake Tapps the water flows through a

[1] The "Muckleshoot Tribe" is a present-day tribal entity organized under the Indian Reorganization Act, 48 Stat. 988, 25 U.S.C. § 476 and 479. It is recognized by the United States as a currently-functioning Indian tribe maintaining tribal government on a reservation. The Tribe's present membership roll was approved by a representative of the Secretary of the Interior on December 15, 1969. The Tribe presently has approximately 386 members.

concrete-lined tunnel to six high-pressure penstocks which carry it to the power house at Dieringer, Washington. After passing through the turbine generator units in the power house, the water is returned to the White River through a half-mile long unlined tailrace channel.

The project design alters the flow of the river at a point approximately six miles upstream of the Muckleshoot Indian Reservation, and the diverting canals and flumes return the water to the natural course of the White River at a point four miles downstream of the reservation. This diverts water from a 16-mile segment of the river (between Buckley and the tailrace of the Dieringer Power Plant).

At the time of its construction in 1911 the project consisted of two turbine generator units with a name-plate rating of 15,000 kilowatts each. A third generator with a 16,000 kilowatt rating was added in 1918 and a fourth similarly-sized unit was installed in 1924. The basic design of the project has not changed since the fourth generating unit was installed in 1924; the rewinding of units three and four in the 1950's, while altering the name-plate ratings, did not alter the electro-magnetic characteristics of the generators. All parties agree that the construction and horsepower of the turbines and the general hydraulic design of the facility are the same as they were at the time the last unit was added in 1924.

III

APPLICABLE STATUTES

The following is a precis of those sections of the Federal Power Act (the Act) and the Federal Water Power Act (1920 Act) pertinent to this proceeding.

Section 3(8)—Defines the term "navigable waters" so as to include bodies of water over which Congress has jurisdiction through its commerce powers.[1]

Section 3(2)—Defines the word "reservation" so as to include Indian reservations and land interests owned by the Government.

Section 4(e)—Authorizes the Commission to issue licenses for project works (a) on water over which Congress has commerce power jurisdiction (but see note 1 on p. 3, *supra*); (b) on public lands or reservations, or (c) where the project's purpose involves the utilization of surplus water from any Government dam.

Section 23(b)—Specifies that it is unlawful to operate a project on navigable waters, public lands or reservations or which utilizes surplus water from a Government dam without a license, unless such project was validly operating prior to the 1920 Act. Thus, pursuant to the Commission's investigation, any proposal which either affects commerce or public lands or reservations must be licensed by the Commission.

Section 4(d)—1920 Act—Empowers the Commission to issue licenses for project works necessary for development or improvement of navigation, located upon public lands or reservations or which utilize surplus water from Government dams. A license may not interfere with a reservation or be inconsistent with the reservation's purposes.

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[1] It cannot escape notice that the grant of authority to the Commission as to "navigable waters" is less than the whole of Congress' power to grant. The power entrusted to the Commission is based on Congress' "authority to regulate commerce with foreign nations and among the several States". (16 U.S.C. 796(8)) The totality of Congress' authority is "to regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes" (U.S. Constitution, Art. I, Sect. 8). This is not the first time the Act is construed that the Commission's authority is not as broad as that of Congress to grant. *Conn. L & P* v. *F.P.C.*, 324 U.S. 515, 529-530 (1948). The arguments on brief generally overlook this distinction.

IV

POSITIONS OF THE PARTIES

Briefly, the Muckleshoots and Staff argue that the White River is navigable water of the United States and as such, jurisdiction over the project arises through Section 4(e) and 23(b) set out above. Interior and the Muckleshoots specifically argue that although none of the physical structures of the White River Project is located within the geographic boundaries of the reservation, the project affects the reservation under the terms of the 1920 statute and, in particular, that the diversion of water from the reservation deprives the Muckleshoots of treaty-protected rights in certain natural resources. Additionally, the Muckleshoots, Interior and Fisheries assert that the project occasionally utilizes surplus water from the government dam at Mud Mountain—a benefit from a Federal project assertedly causing jurisdiction to attach. The Muckleshoots individually claim the Commission has jurisdiction over the project because of the White River's effect on interstate commerce. It contends that even if the White River were to be considered non-navigable, it is so important to the downstream navigable capacity of other rivers that it has an overall effect on commerce.

Puget takes the position that the White River does not meet the most basic tests for navigability. Regarding its use as a navigable stream, Puget asserts that there is no evidence that these activities were regularly or very successfully accomplished. Puget further asserts that the Commission has no jurisdiction merely because the project has some effect on the Indian reservation. It strenuously avers that Section 4(d) of the 1920 Act clearly gave the Commission jurisdiction only where the project was located on navigable waters or upon any part of the public lands and reservations of the United States. Puget also emphatically denies the Commission's right to jurisdiction over the project based upon the use of surplus water from the Mud Mountain Dam. Mud Mountain, it asserts, is a single-purpose flood-control project; was developed 37 years after the construction of the project; has no contractual relationship with the project; and is not operated to purposefully benefit the project.

V

DISCUSSION AND FINDINGS

In a companion proceeding, (Project 2495) Puget reluctantly also asked the Commission to determine whether FPC jurisdiction had attached to one of its several Washington plants. In finding jurisdiction in that case, the Commission found that construction had occurred since the adoption of amendments to Section 23(b) of the Act and that the Congressional policy in enacting that statute favored finding jurisdiction, FPC 1975. Those amendments required Commission licensing of previously non-jurisdictional projects if they had undertaken subsequent "construction". Such is not here at issue. No party to this proceeding has argued that any construction has occurred which would make Project 2494 jurisdictional. Questions regarding jurisdiction arising out of this action, therefore, involve issues of:

(A) Whether the White River is navigable under Section 3(8) so as to confer jurisdiction under Section 4(e) of the Act.

(B) Whether the effect of the project upon the Muckleshoot Reservation under Section 3(2) is relevant under Section 4(e) of the Act.

(C) Whether the project utilizes surplus water from a government dam in such a way as to confer Commission jurisdiction under Section 4(e) of the Act.

A. Navigability

The question of the stream's navigability has been the key question throughout this phase of the proceeding. Evidence has been tendered to demonstrate numerous transportation and commercial uses of various segments of both the pre-1906 stream system[1] and the present system. While the question of

[1] This "River" is a changing animal. Originally the White River flowed from its source at Mount Rainier in a northwesterly direction toward Puget Sound. Near Auburn, Washington, the White was joined by the Green River and continued as the White River. As the water continued to move

(footnote continued on following page)

navigability is not based solely on an evaluation of that portion of the river affected by the project at the time of its construction, the examination of the portion of the river where navigability is claimed is the prime area to be investigated. Consequently, while all of the evidence on navigability has been weighed, the greater weight has been awarded that evidence given to the portion of the river directly impinged upon by the project.

1. The River As a Transportation Mechanism

The record of this proceeding is replete with accounts, analyses, and conjecture regarding the feasibility and degree of use of the White River for transportation. A review of this testimony is necessary to ascertain the White River's navigability.

Thomas M. Statson, a licensed professional engineer in the State of California, testified on behalf of the Muckleshoots from historic records of water flows in the White River—including those published by the U.S. Geological Survey. He concluded that the low flow of the White River in its natural state in that portion of the river at issue was approximately 300-400 cubic feet per second, which, in his opinion would support canoe traffic. Barbara Lane, an anthropologist, analyzed the studies of several early historians in order to ascertain the existence of traditional Indian villages along the White River. Through earlier studies (1917-1920) by T.T. Waterman, an anthropologist at the University of Washington, she determined that a

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(footnote continued from preceding page)
downstream it was joined by the Black River and then by the Cedar to form the Duwamish which flows into Elliot Bay of Puget Sound at Seattle, Washington. In 1906 a flood altered the course of the White River, causing it to flow into the Stuck River at a point west of the Muckleshoot Indian Reservation. The river continues as the White-Stuck until it joins the Puyallup River and ends up in Commencement Bay of Puget Sound at Tacoma, Washington. Puget's diversion of a portion of the river between Buckley and Dieringer occurred between 1909 and 1911 as a part of the construction of the White River Project. As a flood control measure, King and Pierce Counties constructed a dyke in 1915 which made the river's post-1906, flood-altered course permanent. Since 1915 the course of the river has been literally "set-in-concrete." See Appendix A—Map of the White River System. Houses are built on the 19th Century river bed and the lower reaches of the Puyallup are used by small craft at Commencement Bay.

village existed along the river near the present town of Enumclaw, Washington. This is an area within the 16-mile diversion of water from the stream bed. She further theorizes that, since villages were located near water so the villagers would be able to use river transportation, the relevant portion of the river was navigable.

Witnesses Starr, Barr and Williams, all Muckleshoot tribe members, testified of their remembrance of canoe travel along the river. Louis Starr, age 75 at the time of the hearing, paddled the river in large canoes at a time before diversion when the White was a "whole river", a river which "a man couldn't walk across. . ." (Tr. p. 253). Maggie Barr, a 79-year-old Muckleshoot Indian who has spent a lifetime on the reservation, remembers as a teenager that the river used to "rage" when "the White River flowed into the Green River" (Tr. p. 258). Presumably this is reference to the spring run-off prior to 1909—the date of the project.

Robert Paul Thomas, of the Department of Economics at the University of Washington, testified on behalf of Puget. He investigated reports by early historians and military officers dating back to 1854, and, based upon these reports, concludes that the reach diverted by the White River Project above Auburn was ". . . clearly unfit for navigation . . ." and that ". . .diligent research has revealed no evidence of any navigation ever occurring above Auburn" (Tr. p. 56).

2. The River As a Mechanism of Commerce

a. Log Floatation and Shingle Bolts

It is undisputed that shingle bolts were floated commercially on several of the rivers in the area of the White River Project.[1] Statson believes that the pre-diverted White River could have handled these bolts:

[1] Evidence of regular and commercially successful use of a river for transporting logs in commerce has been shown to justify the Commission's conclusion that the river was navigable and therefore jurisdictional. *Wisconsin Public Service Corp.* v. *F.P.C.*, 147 F.2d 743, 746-747 (7th Cir. 1945) and cases cited therein. A shingle bolt is a piece of wood normally cedar, suitable for making shingles and generally cut into pieces 18 inches in length from the log.

> The shingle bolts would be of western red cedar and depending upon the percent of heartwood and percent of sapwood and the moisture content of such wood the displacement would vary. However, it is my opinion that squared off shingle bolts would float in the river with no more than half of their depth submerged. If western red cedar logs were floated in the river, that is logs still having their bark intact and being generally round, I would estimate that they would float with no more than about two-thirds of their diameters submerged. (Tr. p. 142)

Muckleshoot witnesses also sought to prove the use of the White River for shingle bolt flotation. Starr recalls shingle bolts being floated through that section of the river with which we are concerned here—i.e., "down to Sumner from way up in the mountains." (Tr. p. 255). Starr also emphasizes that the cedar bolts were cut by non-Indians as well as Indians and were floated from a point upstream of both the Buckley Diversion Dam, and the present Mud Mountain Dam. Williams stated that ". . . the river was big before they changed it," (Tr. 262) and witness Lozier testified, "It used to have lots of water. Now you can walk across" (Tr. 267).

Puget witness Thomas testified otherwise. After reviewing historical material concerning the area, he found ". . . no evidence of any navigation ever occurring above Auburn, nor is there any evidence we could find of log drives on this section of the White River" (Tr. p. 56). That portion of the White River which is diverted by the project lies principally upstream of Auburn, Washington.

b. Traders, Trade and Other Commerce

Arthur Williams, who has lived in the area for over 60 years, recalls that trading fish, hides and berries occurred between Canadian Indians and the Muckleshoots. The traders, Williams asserts, were brought together by maneuvering their canoes along the river. Lane testified that her research indicated the use of steamers and barges on the White River upstream from Auburn—a small portion of which is within the 16 miles of the stream's diversion. Lane's testimony, stemming from a booklet published in 1865, entitled, "Navigable Streams West of the Cascades." (Exh. 47), is that one Asa Mercer

described the Duwamish River as being formed by the Black and White Rivers. Mercer concluded the Duwamish-White to be navigable for steamer use for a distance of some 32 miles; which apparently brought steamer navigation inland as far as Auburn. Lane concludes, therefore, that the Duwamish-White River system was used by shallow draft steamboats, barges and scows upstream as far as the confluence with the Green River.

3. Findings

Section 3(8) of the Federal Power Act vests the Commission with jurisdiction over only those hydroelectric projects which are located on waters which are or were navigable. This has been the law since 1920—i.e., 9 years after the project was completed and 53 years before the pending application was filed.[1] In the *U.S.* v. *Appalachian Electric Power Company*, 311 U.S. 377 (1940), the Supreme Court established criteria for determining a river's navigability for FPC jurisdictional purposes. In *Rochester Gas and Electric Corp.* v. *Federal Power Commission*, 344 F.2d 594, 596 (2d Cir. 1965), the Second Circuit succinctly applied the *Appalachian* criteria to a subsequent Commission proceeding by stating a river to be navigable if (546):

> "(1) it *presently* is being used or is suitable for use, or (2) it has been used or was suitable for use in the *past*, or (3) it could be made suitable for use in the *future* by reasonable improvements."

Thus, if jurisdiction over the project is to be based on navigability, the affected portion of the White River must meet some portion of the *Appalachian* test. No party argues that the White River is presently navigable in the area affected by the project. Nor does anyone suggest improving the river so as to make it navigable. We are, therefore, left only with the middle ground, whether or not the affected area was, in fact, navigable at some earlier time.

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[1] Laches does not apply. Clearly, however, time is not of the essence in disposing of this claim.

The evidence does not show navigability as that term is used in the statute. Prior to 1906 the White River was a portion of the White-Duwamish River System, a generally unstable glacially-fed river system.[1] Staff elaborately and thoroughly cites a body of testimony picking up isolated uses on 75 miles of river, only 16 miles of which were directly affected (see Staff Brief, pp. 4-12). Giving full evidentiary weight to these isolated uses, however, does not make a case for navigability for that portion of the river primarily at issue here. To begin with, the fact of the matter is that not even shingle bolt floatation could be accomplished on this stream in its natural state at a time contemporaneous with the project's construction. The Supreme Court of Washington so found in *Sumner Lumber & Shingle Co.* v. *Pacific Coast Power Co.*, 131 P. 220 (1913). The court states (p. 222):

> . . .It is apparent that, if dependency was had upon the natural condition of these streams, few, if any, shingle bolts would ever reach respondent's mill. The river is a glacial stream, subject to material variation during each summer day on account of the glacial tide. A chart showing the flow is in the record. From this chart it appears that it is

[1] Final control of the flash flood aspects of this glacial stream was not possible until construction of the Mud Mountain Dam flood control project in 1948. While not fully discussed on the record, the White River, in fact, is a classic example of a glacier-fed stream. It is the principal recipient of water from melt-water channels fed by Emmons Glacier, a massive terminal moraine descending from Mount Rainier. Before construction of the Mud Mountain Dam, winter rains on Emmons and spring thaw from the Glacier resulted in a history of flooding throughout the lower Puyallup Valley. Mud Mountain has controlled these common glacial flooding conditions and has additionally lessened the threat of flooding due to glacial outwash, avalanche and burst out. The Geological Survey reports that outwash from Emmons has significantly altered melt-channel flow and course during the past 100 years. Additionally, the survey concludes that avalanches and landslides have occurred at Emmons since at least the 16th Century. There are no reported incidents of outburst flooding on Emmons Glacier but the survey holds such flooding to be unpredictable. Several outburst floods have been recorded on neighboring Mount Rainier glaciers in recent years. See, Sigafoos and Hendricks, "Recent Activity of Glaciers of Mount Rainier, Washington", Geological Survey Professional Paper 387-B (1972); Richardson, "Glacier Outburst Floods of the Northwest", Geological Survey Professional Paper 600-D (1969); Hodge, "The Movement and Basal Sliding of Nisqually Glacier of Mount Rainier", Naval Contract-N00014-67-A-0103-0007 NR307-252 (1972).

> not an unusual thing for the flow to increase or diminish nearly 100 per cent. within a day or two. The result of this intermittent flow is that the bolts are lodged all over the bed of the river, which, on account of numerous past floods and erosions, averages nearly 100 feet, and require constant handling to keep them in the drive.

One cannot dismiss the impact and factual basis of this case on the hypertechnical legal grounds suggested by Staff. Ignoring a local court's evaluation in 1913 of almost the same facts urged 70 years later borders on the absurd. We are still faced with a lack of convincing evidence that the short stretch of river here supported a reasonable commercial enterprise on the basis of the stream's natural or ordinary navigability. As far as navigability was concerned even with aids, the court's decision shows the marginal aspects of the operation, the limited water available for any navigation, and the need for use of the stream banks as an auxiliary aid for even the marginal navigation attempted.

The Commission, in dealing with evidence of logging operations, a more usual index of commercial use of a waterway, has repeatedly required extensive showings of commercial operations before Commission jurisdiction will attach. In *Central New York Power Corp.*, 8 FPC 390, 8 FPC 547 at 563 (1949), for example, the Commission based jurisdiction on logging activity where the party seeking jurisdiction showed that the river had been used for commercial logging for nearly 150 years. Similarly, in *Wisconsin* v. *F.P.C.*, 214 F.2d 334, 337 (7th Cir. 1954), the court affirmed the Commission jurisdiction on the basis of log drives when it was shown that such activities had been conducted regularly and involved millions of feet of lumber. Thus, Commission jurisdiction arising from logging operations consistently has been based upon substantial evidence of continuous and extensive use of the river for log-floating purposes. See also, *New York Power & Light Corp.*, 8 FPC 231 (1949); *Dairyland Power Cooperative*, 8 FPC 1276 (1949). As stated by the court in *U.S.* v. *Rio Grande Dam Irrigation Co.*, 174 U.S. 690, 698 (1898):

> "...The mere fact that logs, poles, and rafts were floated down a stream occasionally and in times of high water does not make it a navigable river...."

We turn next to the only other evidence that supports a finding of navigability—the testimony of the Muckleshoot witnesses about childhood remembrances. The evidence here of the size and use of the White River by those witnesses, however, is less than convincing. Witness Williams, for example, testified that "the river was big before they changed it," (Tr. 262) but as a matter of fact, this is not an eye-witness account since he was not born until after the project was completed. Witness Starr, in discussing the White River before it was diverted, testified that: "My dad hauled people across ...these WPA people, white people. That was after Hoover lost his term as President and Roosevelt was President." (Tr. 254). Starr's testimony on its face appears inconsistent since the project was completed and the river diverted 22 years before Hoover left the Presidency. Witness Lozier testified that he fished on the White River. "The river was big then. It used to have lots of water. Now you can walk across." (Tr. 267). Again, this witness must be referring to another portion of the White River, as diversion by the project predates Lozier's birth. While there is a desire to accord the greatest weight to this testimony, it still weighs in light.

Nor is the case for a finding of navigability bolstered by any documented evidence of substantial traffic along the White River between Buckley and Dieringer. In fact, such evidence is non-existent within the four corners of this record. The best gloss that can be placed on witness Lane's testimony is that there is a strong possibility of the past existence of a traditional village upstream of the current project. She hypothesized the use of canoes along the White River as the primary means of travel to the probable village which generally were built along streams. Lane's own exhibit (Exh. M/L303), however, indicates that if this village did in fact exist, it was a considerable distance from the White River on a small creek which could not possibly support canoe traffic. Furthermore, maps kept by the White River Historical Society establish the existence of a road running through the location of the purported village, thereby

negating much of the need for water as a transportation means. Neither the Commission nor the courts have found navigability on such weak, inconclusive, and sketchy evidence. The Supreme Court discussed evidence of navigability similar to that offered in the instant case in *The Montello*, 87 U.S. 430 (1847), wherein the court stated (p. 442):

> . . .It is not, however, as Chief Justice Shaw said, [*Rowe* v. *Granite Bridge Co.*, 21 Pick. 344], 'every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture.'

In *Leovy* v. *United States*, 177 U.S. 621, 632 (1900), the Court more narrowly defined the term "Navigable Waters of the United States" when it stated that such ". . .has reference to commerce of a substantial and permanent character to be conducted thereon." The waterway in question must be susceptible for use as a channel of useful commerce and not merely capable of exceptional transportation during periods of high water. See *Brewer Oil Co.* v. *United States*, 260 U.S. 77 (1922) and cases cited therein.

In light of the Court decisions, both State and Federal, the Commission decisions, and the record presented in this proceeding it is concluded that jurisdiction over the White River Project No. 2494 should not, and cannot, be found on the grounds of the navigability of the White River in the area affected by the development.

B. Effect on the Muckleshoot Reservation

Section 4(e) of the Act grants the Commission the authority to license power projects located upon any part of a reservation (16 U.S.C. 797(e)). The Act defines "reservation" so as to encompass ". . .tribal lands embraced within Indian reservations, . . .". (16 U.S.C. 796 (2)). Relying on these provisions, the Muckleshoots advance the proposition that jurisdiction over the project attaches by virtue that the development is located on their reservation. Alternatively the

Muckleshoots, and here they are joined by the Department of the Interior, argue that even if the project is not physically located on reservation lands, jurisdiction still arises because of the effect of the project upon the Muckleshoots.

1. Location on Reservation Land

The Muckleshoot Indian Reservation, as defined and described by the aforementioned Indian Reorganization Act of 1935, lies within the area between Puget's diversion dam at Buckley and the Dieringer tailrace. While none of the physical structures of the project is located within the confines of the reservation, it is argued that up to two-thirds of the White River's natural flow through the tribal lands during periods of the year has been diverted by the project.[1] The Muckleshoots argue that the right to use certain waters may be a coextensive property right of a reservation. *Winters* v. *United States*, 207 U.S. 564 (1908); *United States* v. *Powers*, 305 U.S. 527 (1939); *Arizona* v. *California*, 373 U.S. 546 (1963). In support of this argument, the Muckleshoot witnesses discussed the use of the river for fishing purposes. All had recollections as previously discussed, of fishing for food and for trade in the waters of the White River. The Tribe contends, therefore, that where a river plays such an integral role in the existence of the riparian people, the river becomes a part of the reservation.

Secondly, the Muckleshoots contend that Section 3(2) of the Act (16 USC § 796(2)) defines "reservation" so as to include the bed of the White River and the water and fishing rights reserved by the Tribe. The Tribe asserts that the water and fishing rights and the White River bed constitute "tribal lands embraced within Indian reservations," or "interests in lands owned by the United States" in trust for the Muckleshoots. Citing, *Choctaw Nation* v. *State of Oklahoma*, 397 U.S. 620 (1970). Since the river bed is part of the reservation, the Muckleshoots aver that so is the water, citing *United States* v. *Pollmann*, 364 F. Supp. 995 (1973). The Muckleshoots' position, in final analysis, is that the effect of the project upon

[1] Low water at times other than glacial run off, in fact, may be a result of climatological changes over the past 60 years having nothing to do with any man-made or induced phenomena, but no party developed this possibility on the record.

the Tribe is so great as to make the project jurisdictional even if the project is not physically on the reservation. See, *e.g., Pacific Gas and Electric,* 2 FPC 516 (1941). As mentioned, the Muckleshoots assert that the reduction of river flow through the reservation has been disasterous to their fishing.

The Department of the Interior presented James L. Heckman, a fishery biologist, who testified as to the effect of Project 2494 on fishing in the area of the Muckleshoot Reservation. Heckman testified, based upon his knowledge of the background of the White River fishery, that the affected area, ". . .has in the past supported substantial runs of spring and fall chinook, coho and chum salmon as well as steelhead trout." When questioned regarding the present White River condition he stated:

> Anadromous fish production in the White River between the Buckley and Dieringer diversion is low and has been for many years. While there are many complex and interacting factors which contribute to this low production, the primary cause for the low fish production of the White River is a lack of adequate stream flow for a significant portion of the year below Puget Sound Power and Light Company's diversion dam. This low flow adversely affects both upstream and downstream fish migrations and substantially reduces the spawning and rearing potential of the river.
>
> . . .In my estimation the critical problem confronting the anadromous fish is the White River Project No. 2494. (Tr. 100-101)

Interior therefore concludes that the loss to the Tribe of the beneficial use of the White River constitutes the destruction of one of the reservation's natural resources within the meaning of Sections 4(e) and 3(2) of the Federal Power Act (16 U.S.C. § 796(2)).

Puget draws no such conclusion and argues that the pertinent language from the 1920 Act gives the Commission licensing jurisdiction only if the project is located *upon* public lands or reservations. There is no mention of the word "affecting" within the relevant portions of the statute. Addi-

tionally, Puget argues, an investigation of the legislative history of both the 1920 Act and the 1935 amendments indicates that Congress intended any use of the term "affect" to mean "upon".

Puget also avers that the Commission has never required that a project be licensed where the development's effect on public lands or reservations was other than being located upon such property. It cites *Re The Pigeon River Lumber Co.*, 12 P.U.R. (NS) 452 (FPC 1935) as directly in point. The Commission was there concerned with a number of proposed dam sites, some located on and some off the Grand Portage Indian Reservation. Puget asserts that the Commission conclusion in *Pigeon* that the two dam sites off the reservation property did not affect government property, "clearly posits that a project must be constructed inside or upon government lands or reservations to affect them." (Puget Initial Brief 20.)

2. Findings

We deal first with the Muckleshoots' argument that the water has been reserved for the Muckleshoots' exclusive use. In *Winter, supra,* settlers in Montana had diverted a river's flow away from a reservation, thereby denying the Indians the ability to use the water. The court first found that the land within the reservation was arid and without irrigation and was practically valueless. It concluded that without the water the land was uninhabitable; and therefore, the treaty, despite no specific language reserving the water, must have intended that the tribe have a reserved right to use the river. The court was faced with a similar issue in both *Powers, supra,* and *Arizona* v. *California, supra.* In *Powers,* the court determined that the treaty which initially established the reservation had contemplated the Indians' utilization of the land for agricultural purposes. Since water is necessary for cultivation, the court concluded the treaty operated by implication to reserve the waters within the reservation for the benefit of the tribe. The 1963 decision in *Arizona* v. *California,* determined that water had been ceded by the government to the affected tribes at the time of the original treaty. The court again concluded that

without the use of the water for irrigation purposes life on the reservation could not be sustained. The Indians' rights to the water again were upheld.

Clearly, these cases have a thread of commonality. The water right sought to be protected involved irrigation of tribal lands and absence of the water would render the land uninhabitable. This is not the case at bar. There is no evidence to indicate that the absence of the river renders the reservation lands "valueless" (*Winters, supra,* at 576) or ". . . that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised." *Arizona, supra,* at 599.

Also, since the language of treaties between Indian tribes and the United States government are often styled in ambiguously broad terms, courts have found it necessary to interpret the inferences embodied within those agreements. The Muckleshoots analogize their situation with that of the Choctaw and Cherokee in *Choctaw Nation* v. *Oklahoma,* 397 U.S. 620 (1976). There, the court interpreted the treaty agreements of Dancing Rabbit Creek, Sept 7, 1830. 7 Stat. 333-334; and New Echota, Dec. 29, 1835, 7 Stat. 478, as giving the tribes ownership of certain portions of the bed of the Arkansas River. In making such a decision the court examined the language of the agreements and the contemporaneous facts surrounding their development. It is at this point of the examination that *Choctaw* becomes readily distinguishable from the instant case. The language of the *Choctaw* treaties provides for the land reserved for Indian use to be given to the tribe in "fee simple" and never be ". . . embraced in any Territory or State." Dancing Rabbit Creek (p. 625). Such language of sovereignty was authorized in order that the affected tribes be made to understand the permanence of this reservation. Both the Choctaw and the Cherokee were scarred from governmentally ordered "resettlement" to escape the onslaught of white migration and violation of prior treaties. It is clear that Congress intended to in some way ameliorate the tragedy that had befallen these people in "The Trail of Tears." See the concurring opinion of Justice Douglas, 397 U.S. at 636.

The Muckleshoots offer no evidence of Congressional intent to deed the White River, either its bed or its water, to the Tribe. The treaty of Point Elliot ultimately affirmed by executive order of President Grant, established the Muckleshoot Reservation, "... for the exclusive use of the Indians in that locality ...." There is no mention of land being conveyed in fee, of the Indians' power to govern the land, or any pledge that said land should be exempt from territory or state control. In order that an inference may be drawn regarding the intent of Congress that an Indian tribe have title to a river bed, the intention must be clear and is not lightly to be inferred. *United States* v. *Holt Bank*, 270 U.S. 49, 55 (1926). If there, in fact, were an intent on the part of Congress to cede the river bed and water of the White River to the Muckleshoot Tribe, such has not been presented by the record of this proceeding.

As stated earlier, the Commission's licensing jurisdiction may not go beyond the Federal Water Power Act of 1920 (16 USC 791-823). Section 4(d) of the 1920 Act limited the Commission's licensing jurisdiction to projects located "... upon public lands or reservations."

The case offered as precedent for finding that the project need only affect public land is *In the Matter of Pacific Gas and Electric*, 2 FPC 516 (1941). The project under consideration there was a post-1935 development which was an "integral part of a comprehensive development of the water resources of the region." (at 529). As such, the fact that the element of the total project under consideration was not on public land was immaterial to the scope of the entire construction. The rest of the operation was on public land, and this segment of the whole, therefore, fell within the ambit of Federal licensing authority. Such is not the case here. To require licensing of a project located totally on non-public land because of it may have some effect on public land is beyond the scope of the 1920 Act. See *Pigeon River Lumber, supra.*

C. Use of Surplus Water From a Government Dam

Licensing jurisdiction may be predicated on Section 4(e) of the Act which grants the Commission jurisdiction if a project utilizes "the surplus water or water power from any Government dam," (16 U.S.C. § 817). As stated, *supra*, the Mud

Mountain Dam is a flood control project located upstream from Puget's Buckley Diversion Dam. The dam regulates the flow of water down the White River and thereby controls flooding in the lower Puyallup Valley. When the river is in a non-flood condition the Corps of Engineers regulates that flow at the request of interested parties, including Puget. When storage water is released at rates different than run-of-river flow, Project 2494 is provided with either an increase or decrease in water for power production.

1. Evidence

The Muckleshoots argue that flow manipulations of water coming from Mud Mountain inure to the benefit of Puget. When more water flows, more power can be produced. When less water flows, Puget can maintain and repair its flash boards. The Muckleshoots contend that Mud Mountain's accommodation of Puget's needs for greater or diminished flow makes the project jurisdictional under the surplus flow clause of the Act.

The Commission, the Muckleshoots advance, settled the issue regarding surplus water use in *The California Oregon Power Company*, 13 FPC 1 (1954), wherein it stated (P. 41):

> . . . Where there is available stored water. . . .above that needed for irrigation and which would otherwise flow unused down the main channel of the stream, that water is surplus water, and if used for power development, would require a license from this Commission. . . .

Fisheries offered witness Lloyd Phinny who testified of numerous occasions in which the flow from the Mud Mountain Dam had been regulated for Puget's benefit (Tr. 93-94). Additionally, Fisheries looks to the Mud Mountain Reservoir Regulation Manual which contains provisions allegedly designed to coordinate Mud Mountain operations with those of Puget. The Department believes such actions are not in keeping with those of a single-purpose flood-control project. Such conjunctive operations between Project 2494 and a government dam, it argues, gives the Commission licensing jurisdiction.

Puget offered the testimony of Norman MacDonald of the Corps of Engineers. MacDonald, who directs operations at Mud Mountain testified that the Corps had no contracts or agreements to coordinate operations with any group or entity downstream of the Mud Mountain Dam (Tr. 63). He admitted that the Mud Mountain project coordinates with downstream water users, including Puget, whenever possible. However, a study conducted in the late 1950's to determine whether Mud Mountain could be operated to provide power for the White River resulted in a conclusion of total infeasibility. MacDonald asserts the dam is a single-purpose flood-control project and any benefits which accrue to Puget are incidental.

2. Findings

The Mud Mountain Project is operated by the Corps of Engineers as a flood-control project to protect the lower Puyallup Valley. Mud Mountain was not constructed in cooperation with Project 2494, but was built 37 years later. Benefits which fall to Puget as a result of Mud Mountain's regulation of water flow do, in fact, improve the effectiveness of Project 2494. Such improvements do not inure to the benefit of Puget at any burden or cost to Mud Mountain and are totally incidental and unpredictable. There is no contract, as in *California Oregon Power, supra*, or corresponding agreement between the two entities. The use of surplus water from the Mud Mountain Dam by Puget does not give the Commission licensing jurisdiction over Project 2494.

VI

CONCLUSION

The affected reach of the White River does not constitute a navigable river as defined by Section 3(8) of the Federal Power Act (16 U.S.C. § 796(8)). The effect of this pre-1935 Project 2494 upon the reservation does not confer licensing jurisdiction upon the Commission. Additionally, Puget's use of surplus water from the governmentally operated Mud Mountain Dam does not advance Commission jurisdiction based upon Section 4(e) of the Act. Project 2494 therefore is not subject to the jurisdiction of the Federal Power Commission under Section 4(e) of the Federal Power Act (16 U.S.C. § 797(e)).

For all of the reasons stated above, the application is denied for want of jurisdiction.

Appendix C

PUGET SOUND POWER & LIGHT COMPANY—Project No. 2494

OPINION NO. 2

OPINION AND ORDER FINDING WHITE RIVER TO BE NAVIGABLE, REVERSING INITIAL DECISION AND GRANTING INTERVENTION

(Issued October 28, 1977)

Before Commissioners: CHARLES B. CURTIS, Acting Chairman; DON S. SMITH and GEORGIANA SHELDON, Acting Commissioners.

Digest Section	Syllabus
2601	The Commission reverses an initial decision holding that the relevant reach of a certain river is not a navigable water of the United States. Thus, it denies a power company's request for permission to withdraw its license application for a project on that river.

APPEARANCES

DOUGLAS P. BEIGHLE, WILLIAM S. WEAVER and JOHN C. MASON for Puget Sound Power and Light Company

JOSEPH L. CONIFF, JR., for Washington Department of Game and Washington Department of Fisheries

CHARLES E. O'CONNELL, JR., for The Secretary of the Interior on behalf of the Muckleshoot Indian Tribe

L. GRAEME BELL, III, THOMAS L. SMITHSON and ALEXANDRA HARMON for the Muckleshoot Indian Tribe

JOHN GOSSELL and LINDA L. LEE for the Staff of the Federal Power Commission

1. On October 1, 1977, pursuant to the provisions of the Department of Energy Organization Act (DOE Act), Public Law 95-91, 91 Stat. 565 (August 4, 1977) and Executive Order No. 12009, 42 Fed. Reg. 46267 (September 15, 1977), the Federal Power Commission ceased to exist and its functions and regulatory responsibilities were transferred to the Secretary and the Federal Energy Regulatory Commission (FERC) which, as an independent commission within the Department of Energy, was activated on October 1, 1977.

2. The "savings provisions" of Section 705(b) of the DOE Act provide that proceedings pending before the FPC on the date the DOE Act takes effect shall not be affected and that orders shall be issued in such proceedings as if the DOE Act had not been enacted. All such proceedings shall be continued and further actions shall be taken by the appropriate component of DOE now responsible for the function under the DOE Act and regulations promulgated thereunder. The functions which are the subject of these proceedings were specifically transferred to the FERC by Section 402(a)(1) of the DOE Act.

3. The joint regulation adopted on October 1, 1977 by the Secretary and the FERC entitled "Transfer of Proceedings to the Secretary of Energy and the FERC," 10 CFR , provided that this proceeding would be continued before the FERC. The FERC takes action in this proceeding in accordance with the above mentioned authorities.

4. The White River flows about 57 miles in a general northwesterly direction from the foot of Emmons Glacier on Mount Rainier to its confluence with the Puyallup River, which river, in turn, flows an additional 10 miles also in a general northwesterly direction into Commencement Bay on the Puget Sound at Tacoma, Washington. Prior to 1906 the main stream of the White River turned toward the north at Auburn, Washington, where it was joined by the Green River, and flowed in a general northerly direction to its confluence with the Black River, which rivers formed the Duwamish River which, in turn, flowed into Elliott Bay on the Puget Sound at Seattle,

Washington.[1] We find that the White River is one of the "navigable waters" of the United States within the meaning of Section 3(8) of the Federal Power Act[2], upstream from both of its mouths at least to the vicinity of Buckley, Washington. And we conclude that Puget Sound Power & Light Company (Puget Power) is prohibited by Section 23(b) of that Act[3] from operating and maintaining its diversion dam in and across the White River at Buckley, together with all other works of its White River Project which are incidental to the development of electric power from the White River waters which it diverts at Buckley, without a license issued pursuant to Section 4(e).[4]

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[1] See Appendix A which is derived principally from Exhibit No. 36, a U.S. Geological Survey map of the White and Green River basins.

[2] Section 3(8) defined the term "navigable waters" as meaning "those parts of streams or other bodies of water over which *Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States*, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, *are used or suitable for use for the transportation of persons or property in interstate or foreign commerce*, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority".

[3] Section 23(b) provides, in pertinent part,

> "It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any *of the navigable waters* of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a . . . license granted pursuant to this Act . . . "

[4] Section 4(e) authorizes the Commission, among other matters,

"To issue licenses . . . for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for . . . the development, transmission and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam . . . "

THE WHITE RIVER, PAST AND PRESENT

5. The White River is an unusual waterway in that, historically, it has had two mouths. Prior to 1906 its main stream turned toward the north at Auburn, where it was joined by the Green River, and eventually formed the Duwamish River which flowed into Puget Sound. A lesser stream, at least during periods of high flow, entered the nearby Stuck River at Auburn, which river turned toward the south and joined the Puyallup River at Sumner, Washington. In 1906 floodwaters of the White River formed a barrier of boulders, gravel and other debris across the bed of its main stream at Auburn, causing it to enlarge its channel into the Stuck River which, thereupon, became the channel for the White River. And thereafter the local governments constructed additional barriers to make the change in channels permanent,[5] and eventually permitted the construction of houses and other structures in the former bed of the White River.

6. In 1912 Puget Power's predecessor, Pacific Coast Power Company, completed and placed into operation two generating units of the so-called White River Project. Additional units were added in 1918 and 1924. The principal project works include the diversion dam at Buckley (river mile 24.2), which is 352 feet long, rises 4 feet above the natural bed of the river and includes a system of removable flashboards which can increase the water level an additional 7 feet. The dam diverts water from the White River through a series of flumes, canals and settling basins into Lake Tapps, which is a storage reservoir. The water is then taken by penstocks to the powerhouse at Dieringer, Washington, where it is discharged through a tail-race into the Stuck River at river mile 3.4. Puget Power's 14-mile man-made waterway thereby by-passes almost 21 miles of the White and Stuck Rivers of which about 6 miles of river flow in and out of portions of the Muckleshoot Indian Reservation, established by treaty in 1857.

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[5] Today, the White River is known as the Green River in its reach from Auburn to the Duwamish River, and the Stuck River is known as the White River. For clarification, the name "Stuck River" will be used herein to refer to the former Stuck River as well as the reach of the White River which was formerly known as the Stuck River.

7. The gradient of the White River descends at an average rate of approximately 32 feet per mile from Puget Power's diversion dam, past the Muckleshoot Indian Reservation and to a point on the Stuck River which is some two to three miles above Puget Power's Dieringer tailrace. From that point, the gradients of the Stuck and Puyallup Rivers descend at a combined average rate of about 4 feet per mile on their journey to Puget Sound. And from its confluence with the Green River at Auburn, the former White and Duwamish Rivers also descended at about 4 feet per mile to Puget Sound.

8. Being a relatively short glacial stream and one which also drains a small portion of the western slope of the Cascade Range, the flow of the White River is significantly affected by the impacts of the weather upon the melt of Emmons Glacier and of the moist Pacific winds upon the Cascade Range. As a result of such impacts and steep gradients in mountainous areas, the White River is subject to periodic freshets which are characterized by rapidly moving waters and which carry downstream considerable amounts of debris, including boulders and gravel. Freshet and similar conditions cause Puget Power to remove the flashboards from its diversion dam and close its diversion intake.

9. On the basis of figures published by the Geological Survey of the Department of the Interior, the White River at a measuring gauge near Buckley can expect a 7-day low flow of 480 cubic feet per second (cfs) every two years, 390 cfs every five years, 340 cfs every 10 years and 300 cfs every 20 years. Similarly, it can expect a 30-day low flow of 600 cfs every other year, 500 cfs every 5 years, 440 cfs every 10 years and 400 cfs every 10 years.[6] At the same gauge, the White River can expect a flow of at least 2,700 cfs 10% of the time, 2,000 cfs 20% of the time, 1,600 cfs 30% of the time, 1,300 cfs 40% of the time, 1,100

[6] The figures are based on 1946-1964 data. At a measuring gauge just upstream from Puget Power's Dieringer tailrace the Stuck River can expect a 7-day low flow of 58 cfs every two years, 47 cfs every five years, 41 cfs every 10 years and 37 cfs every 20 years. Similarly, it can expect a 30-day low flow of 70 cfs every other year, 56 cfs every 5 years, 50 cfs every 10 years and 46 cfs every 20 years. The effect of the White River Project on low flows therefore appears to be substantial, and such low flows adversely affect the anadromous species in the river, principally salmon.

cfs 50% of the time, 1,000 cfs 60% of the time, 800 cfs 70% of the time, 700 cfs 80% of the time and 500 cfs 90% of the time. Puget Power asserts that the White River at its diversion dam has an average annual flow of 1,440 cfs, and that under the terms of its water rights it may divert no more than 2,000 cfs from the White River, subject, however, to the requirement that it may not reduce the flow below 30 cfs, for fishery purposes.

10. In 1948 the Corps of Engineers (Corps) completed a single-purpose flood control dam known as Mud Mountain Dam in the White River about 5 miles upstream from Puget Power's diversion dam. In conjunction therewith, the Corps constructed and maintains a fish trap at Puget Power's diversion dam for the purpose of trapping and transporting anadromous species, principally salmon, to points on the White River upstream from Mud Mountain Dam.

PROCEDURAL BACKGROUND

11. In 1920 Congress enacted the Federal Water Power Act which provided in Section 23,

> "That any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce between foreign nations and among the several States, *may in their discretion* file declaration of such intention with the Commission, whereupon the commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not proceed with such construction until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State law [Emphasis added]."

12. In 1935 Congress reenacted the Federal Water Power Act as Part I of the Federal Power Act, substantially without change. Section 23, however, was divided into two subsections, (a) and (b), and the provision quoted in Footnote 3 was enacted as the first sentence of subsection (b). Furthermore, the above quoted paragraph of the former Section 23 was made part of subsection (b) and was modified to substitute the words "shall before such construction" for the words "may in their discretion". The Supreme Court considered these changes in *Federal Power Commission* v. *Union Electric Co.*, 381 U.S. 90 (1965), which is known as the Taum Sauk case, and said that Section 23(b) addresses two matters, first, who must file a declaration of intention—"all those who would locate a water power project on a nonnavigable stream within the jurisdiction of Congress"—and second, what projects on nonnavigable streams are required to be licensed—"Congress intended the inquiry into the project's effect on commerce to include, but not limited to, effect on downstream navigability." And the Supreme Court held that "Congress has required a license for a water power project utilizing the headwaters of a navigable river to generate energy for an interstate power system."

13. On November 20, 1964, shortly before the *Taum Sauk* decision, Puget Power filed an application requesting a decision that the Commission does not have jurisdiction to license the construction, operation and maintenance of the works of its White River Project or, alternatively, the issuance of a license. The White River Project was then assigned Commission No. 2494.

14. After *Taum Sauk*, Puget Power indicated its recognition of the Commission's authority to issue a license for its White River Project[7] and, together with the Commission staff, moved forward with respect to its licensing application. Notice

[7] As is discussed, *infra*, the record establishes without question that the White-Duwamish and Stuck-Puyallup river systems were navigable waters within the meaning of Section 3(8) in reaches downstream from Puget Power's White River Project. Apparently in Puget Power's view its White River Project utilized headwaters of navigable waters and, therefore, was required to be licensed under *Taum Sauk*.

of the application was given on March 6, 1967, and published shortly thereafter. And the Department of Fisheries and the Department of Game of the State of Washington (Departments) were permitted to intervene out of time by order issued July 7, 1967.

15. On January 20, 1972, the United States Court of Appeals for the Second Circuit decided in *Farmington River Power Company* v. *Federal Power Commission*, 455 F.2d 86, that a license is not required for a dam constructed prior to 1935 across a nonnavigable stream, rationalizing that the 1935 amendment to Section 23 made the filing of a declaration of intention mandatory with respect to any person "intending" to construct a dam or other project work, and that such mandatory requirement had no retroactive application. As a result, Puget Power, on January 15, 1973, requested permission to withdraw its license application for its White River Project contending, among other matters, that the White River is not navigable at the project. The Commission, by order issued November 20, 1973, permitted the Muckleshoot Indian Tribe (Muckleshoots)[8] to intervene out of time and set to hearing the question of the Commission's jurisdiction over that project. The Secretary of the Interior (Interior) was subsequently permitted to intervene out of time by order issued February 13, 1974.

16. A prehearing conference was held in Washington, D.C., on January 15, 1974, after which a hearing was held in Seattle, Washington, on July 30, and 31, 1974. Following briefing, presiding Administrative Law Judge Nahum Litt issued an Initial Decision on March 3, 1976, in which he discussed the background evidence and law and concluded that Puget Power's White River Project is not subject to the Commission's licensing jurisdiction under any of the theories advocated by the parties, including the navigability of the White River. We have before us the briefs on exceptions which were filed by the Commission staff, the Departments and, jointly, the Muckleshoots and Interior, together with the brief opposing exceptions which was filed by Puget Power. We also

[8] The Muckleshoot Indian Tribe is organized formally under the Indian Reorganization Act, 25 U.S.C. § 476.

have before us a joint motion of the Muckleshoots and Interior to file a "Reply Brief on Exceptions", together with the brief and Puget Power's response opposing the motion. Additionally, we have before us a joint motion of the Muckleshoots and Interior for leave to present oral argument,[9] together with a petition of the Department of Ecology of the State of Washington for leave to intervene out of time, answers thereto which were filed by Puget Power and jointly by the Muckleshoots and Interior and a "response" of the Department of Ecology to Puget Power's answer.

NON-ISSUES

17. In view of our finding herein that the White River is a navigable water of the United States at least as far upstream as Puget Power's diversion dam at Buckley, we do not reach and will not, therefore, address the other theories of jurisdiction other than to explain them briefly and to note that they are opposed by Puget Power. The Commission staff contends, in this connection, that Section 4(g) of the Federal Power Act[10] gives the Commission authority to require owners of unlicensed water power projects to require an application for license, or to cease operation without a license, when a project comes within its licensing jurisdiction under Section 4(e), and the Commission is authorized thereunder to license project works across, along or in "any of the streams or other bodies of water over which Congress has jurisdiction" under its commerce powers. The Commission has jurisdiction over the White River Project, the staff continues, because it generates electric power for

[9] On March 24, 1977, the Muckleshoots also submitted a request for expedited consideration of the exceptions.

[10] Section 4(g) authorizes the Commission,

> "Upon its own motion to order an investigation of any occupancy of, or evidence intention to occupy, for the purpose of developing electric power, public lands, reservations, or streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States by any person, corporation, state or municipality and to issue such order as it may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water power resources of the region."

transmission into interstate commerce, because it is on a headwater of the navigable Puyallup River, and because Congress has asserted jurisdiction over the White River by authorizing the Mud Mountain Dam for flood control.[11]

18. The Muckleshoots and Interior contend that the White River Project cannot be operated and maintained without a Commission license because it utilizes surplus water from the government's Mud Mountain Dam.[12] Additionally, they contend that a license is required by *Taum Sauk*, notwithstanding *Farmington*, because the licensing standard (as distinguished from the filing standard) of Section 23(b) is unchanged from the pre-1935 Section 23, namely, projects which affect interstate or foreign commerce, and projects which affect public lands or reservations, and Puget Power has in fact filed an application for a license. And, they add, Puget Power generates and transmits electric energy in interstate commerce, and the White River Project adversely affects the Muckleshoot Indian Reservation. Finally, they contend that the Muckleshoots were historically "fish-eaters"; that the Muckleshoots have certain treaty and other off-reservation fishing rights;[13] that the term "reservations" is defined in Section 3(2) of the Federal Power Act to include "interests in lands owned by the United States, and . . . reserved . . . from private appropriation"; that Puget Power is prohibited by Section 4(e)[14] from locating any of the project works "upon any part of the . . . reservations of the United States" without obtaining a license; and, therefore, Puget Power's diversion facilities are located upon a "reservation" of the Muckleshoots—a reservation of sufficient water to sustain their fishery.

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[11] We might add that in enacting the Fishery Conservation and Management Act of 1976 which, among other matters, established a 200-mile offshore fishery conservation zone, Congress found that "the anadromous species which spawn in United States rivers or estuaries," among other fish species, constitute valuable and renewable natural resources. These fishery resources contribute to the food supply, economy, and health of the Nation and provide recreational opportunities." Anadromous species migrate through the White River to and from points upstream from Mud Mountain Dam.

[12] They are joined in this respect by the Departments.

[13] *United States* v. *Washington*, 520 F.2d 676 (CA9, 1975).

[14] Apparently they mean Section 23(b).

19. As was pointed out by the presiding judge, the criteria for determining the navigability of a waterway for jurisdictional purposes under the Federal Power Act were established by the Supreme Court in *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377 (1940), and succinctly summarized by the United States Court of Appeals for the Second Circuit in *Rochester Gas and Electric Corporation* v. *Federal Power Commission*, 334 F.2d 594 (1965), at page 596. By these criteria, a waterway is a navigable water if

> "(1) it *presently* is being used or is suitable for use, or
>
> (2) it has been used or was suitable for use in the *past*, or
>
> (3) it could be made suitable for use in the *future* by reasonable improvements."

In view of the substantial diversions of the flow of the White River by Puget Power for more than a half century, no party has offered evidence to show, or contends, that the relevant reach of the river is presently being used or is suitable for use for the transportation of persons or property in interstate or foreign commerce. Nor has any party offered evidence to show that it could be made suitable for such use in the future by reasonable expenditures. We will, therefore, limit our inquiry to whether the White River has been used or was suitable for use for the transportation of persons or property in interstate or foreign commerce at any time in the past. And, if so, it remains navigable today.[15]

NAVIGABILITY

20. The Commission staff, the Muckleshoots and Interior take exception to the presiding judge's conclusion that the affected reach of the White River is not one of the "navigable waters" of the United States within the meaning of Section 3(8) of the Federal Power Act.

21. In evaluating the nature and quantum of the evidence bearing upon whether the White River was at any time used or

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[15] "When once found to be navigable, a waterway remains so." *Appalachian, supra*, 311 U.S., at page 408.

suitable for use for the transportation of persons or property in interstate or foreign commerce, it is significant to note that settlement of the region under consideration did not begin until the 1850's, that the White River changed its course in 1906 and that Puget Power began to divert a substantial part of the river's flow shortly thereafter.[16] Our inquiry is, therefore, effectively limited to little more than a peek into some fifty to sixty years of the life of the river beginning more than a century ago. "Use of a stream long abandoned by water commerce is difficult to prove by abundant evidence."[17]

22. Certainly, there is evidence in the record to indicate that the White River was not navigable over the reach in question. In 1854 Lieutenant Richard Arnold investigated the area for a possible military road and reported, according to a later account, "that the White River was a raging torrent, fordable only during three months out of the year; that even then, the force of the current and the exceedingly rocky bed would make it both difficult and dangerous to cross with pack animals and immigrant stock." The same account reports surveyors' observations in 1867 that, "The [White] river is navigable for steamers of light draft below the mouth of the Green River. Above that point it is very rapid." And further surveyors' observations that the "White River was a fast torrent up to its confluence with the Green at Auburn and was not drivable above that point."[18] Furthermore, an 1862 letter to the Superintendent of Indian Affairs states, "Muckleshoot is some ten miles from the head of canoe navigation."[19] And,

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[16] "[A]bsence of use over long periods of years, because of changed conditions. . .does not affect the navigability of rivers. . . ." *Appalachian, supra*, 311 U.S., at page 409.

[17] *Appalachian, supra*, 311 U.S., at page 415.

[18] Some of the evidence indicates that the rivers in the region were blocked frequently by logs and other debris. For example, the same account explains, "River drives were possible only on a very limited basis in Washington because of the large size of the logs, small and jammed streams." But since permanent obstructions such as falls, shallows and rapids do not make waterways unsuitable for navigation within the meaning of Section 3(8), certainly transient obstructions such as log jams also would not render them unsuitable.

[19] The letter is discussed further, *infra*. With respect to canoe navigation, the record indicates that the Indians designed their canoes for specific uses and water conditions. Furthermore, the canoes on the White River apparently were not bark or skin covered frames, but relatively flat solid dug-outs ranging upwards of 40 feet which were either paddled or poled.

finally, the Supreme Court of Washington held in *Sumner Lumber & Shingle Co.* v. *Pacific Coast Power Co.*, 72 Wash. 631, 131 P. 220 (1913), 131 P., at page 224, that the White River "between the intake and tailrace of the appellant, is not a navigable or floatable stream."[20]

23. But, upon consideration of the entire record, including the record as augmented by the briefs on and opposing exceptions, we are strongly persuaded that the White River was suitable for the transportation of persons and property, and was so used, at least as far upstream as Puget Power's diversion dam at Buckley.

24. An 1865 publication which purports to have been "A Plain Statement of Things as they Exist" in the Washington Territory states,

> "Dwamish (Duwamish) river is formed by Black and White rivers, and discharges into Elliott's bay, navigable the entire length, twelve miles, and White river twenty miles further.... Puyallup river empties into the Inlet twenty miles south of the mouth of Dwamish (Duwamish) river, and is navigable nine miles. These comprise the streams west of the Cascades on which steamers do, or may run."[21]

Similarly, an 1877 publication of an address which was delivered at the Centennial Exposition in 1876 states, "By removing drifts the (Puyallup) river is navigable to the Stuck." And according to a 1964 anniversary edition of the Kent *News Journal*,[22] speaking of steamers,

> "Alvord's Landing in Kent was considered to be the upriver terminus for the river boats, but boats operated as far upriver as Brannon's Donation Claim near Christopher

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[20] The *Sumner Lumber* case is discussed further, beginning at Paragraph 29.

[21] This account would place the head of navigation upstream from Auburn.

[22] Kent, Washington, is on the reach of the Green River which was formerly known as the White River about five miles downstream from Auburn.

and occasionally as far up as the confluence of the Green and White rivers near the present location of Porter's Bridge in Auburn."

25. If steam vessels "occasionally" operated as far upstream as Auburn, it is reasonable to conclude that the White River was suitable for their use as well as for lesser craft at least to that point. Indeed, Louis Starr, a Muckleshoot Indian who was 75 years of age at the time of the hearing, testified that his father and at least one of his friends told him that the Indians carried freight by canoe from Seattle to Auburn.[23]

26. We conclude that the head of canoe navigation on the White River was no further downstream than Auburn, and in the light thereof the 1862 letter to the Superintendent of Indian Affairs takes on added significance: "Muckleshoot is some ten miles from the head of canoe navigation."[24] On the basis of maps in the record it appears that the Muckleshoot Indian Reservation extends from a point which is about a mile south of the former confluence of the White and Green Rivers and about a mile east of Auburn, southeast about six miles along the White River. Whether the author of the letter was referring to the Muckleshoot Indian Reservation or the Muckleshoot Prairie, ten miles downstream would place the head of canoe navigation below Auburn. It appears, therefore, that the head of canoe navigation was at least ten miles upstream, which would place it in the vicinity of Buckley if measured from the center of the Muckleshoot Indian Reservation and above Buckley if measured from the Muckleshoot Prairie.

27. The record indicates that Indian villages in the region were generally located on waterways because canoeing represented the Indians' principal means of transportation and, further, that there was an Indian village on Boise Creek near its

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[23] Such hearsay evidence has probative value and is admissible in administrative proceedings under the Federal Power Act. See the discussion of Section 308(b) in *Montana Power Co.* v. *Federal Power Commission*, 185 F.2d 491 (C.A.D.C., 1950), beginning on p. 497.

[24] There is testimony to the effect that the word "Muckleshoot", standing alone, was used by the writer to refer to the Muckleshoot Prairie, a small flat area east of the reservation.

mouth on the White River (upstream from Buckley). Whatever inferences the existence of that village may raise with respect to the use of the White River for transportation to a point near that village, Mr. Starr testified that the Indians took their canoes to a point about 15 miles above Buckley, near the confluence of the Greenwater River, to pick huckleberries and hunt. His testimony is coroborated by that of Maggie Barr, a Muckleshot Indian who was 79 years of age at the time of the hearing and whose father was a canoeman, who testified that the Indians canoed to the Greenwater River to fish and pick huckleberries, and that they traded some of the fish. Arthur Williams, who is half Muckleshoot and half Puyallup and was 60 years of age at the time of the hearing, testified that when he was a boy (in the early 1920's) he and others poled canoes up the White River to the Greenwater River to set fish weirs, and that they smoked some of the fish which they caught, and traded it at Dieringer.

28. Copies of about a dozen letters in the record dated from 1914 to 1917 requesting the permission of the United States Indian Service of the Department of the Interior to sell cedar shingle bolts[25] from the Muckleshoot Indian Reservation indicate that the White and Stuck Rivers were used to float shingle bolts to Sumner on the Stuck River at its mouth on the Puyallup River. Mr. Starr testified, in this connection,

> "[T]hey used to drive those shingle bolts down to Sumner from way up in the mountains. That's after they changed the river. That is where the mill was. The river used to be one steady stream of shingle bolts at those times. You couldn't see the end of them."

29. Turning to the *Sumner Lumber* case, *supra*, we would observe that the Supreme Court of Washington said, 131 P., at page 222,

> "To be navigable or floatable in law, the stream must possess such characteristic in its natural state. If artificial means or aids are necessary in making use of the stream to float timber, the stream is not floatable."

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[25] A shingle bolt is a quartered section of log about four feet six inches long.

In marked contradistinction, the Supreme Court of the United States said in *Appalachian, supra,* with respect to Section 3(8) of the Federal Power Act, 311 U.S., at page 407,

> "To appraise the evidence of navigability on the natural condition only of the waterway is erroneous. Its availability for navigation must also be considered. 'Natural and ordinary condition' refers to volume of water, the gradients and the regularity of the flow. A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken. Congress has recognized this in § 3 of the Water Power Act by defining 'navigable waters' as those 'which either in their natural or improved condition' are used or suitable for use." (Footnotes omitted.)

30. In *Sumner Lumber,* the Supreme Court of Washington in 1913 treated the White and Stuck Rivers as a single river and noted that there had been 18 drives of shingle bolts from September 1908, shortly before the mill in Sumner began operations, 14 from points below Puget Power's predecessor's diversion dam at Buckley, and 4 from points above that dam. The Supreme Court said that it was clear from the evidence that it would have been "impossible to drive these rivers without men and teams assisting in breaking up jams, opening up new channels, and keeping the bolts from lodging on the banks and bars . . . It is apparent that, if dependency was had upon the natural conditions of these streams, few, if any, shingle bolts would ever reach respondent's mill." And applying the law of Washington as set out in the preceding paragraph, the Supreme Court of that State concluded that the river was not navigable between Buckley and Dieringer.

31. The Muckleshoots and Interior attached an appendix to their brief on exceptions consisting of 27 transcript pages of portions of the testimony of 10 witnesses in the *Sumner Lumber* case, 12 duplicate photographs of a shingle bolt drive between Buckley and Dieringer in 1911 shortly before Puget Power's predecessor commenced operation of its White River Project, and a copy of a map showing the dates, locations and directions of those and other photographs. Puget Power countered in its

brief opposing exceptions, "While these attachments are not properly a part of the record in this case, it is important to respond to this extrarecord [sic] material to insure that the Commission has a fuller understanding of the (Muckleshoots' and Interior's) submission." And Puget Power attached its own appendix to its brief opposing exceptions consisting of 6 more pages of transcript and 5 more duplicate photographs, arguing that its appendix shows that the reach of the White River in question was not used to float sawlogs, but only shingle bolts.

32. The record of the *Sumner Lumber* case is, perhaps, the most reliable existing corroborative evidence of the historic use of the White River for the flotation of shingle bolts. It is evidence given under oath in about 1912 in a lawsuit involving the same issue as is involved herein, namely, the navigability of the White River from Buckley downstream, and at least some of the witnesses whose testimony has been submitted herein appear to have testified for Puget Power's predecessor. The portions of that record which were attached to the Muckleshoots' and Interior's brief, as well as Puget Power's brief, are portions of an official court record which lack only the testimony of their custodian that they are what they purport to be. None of the parties has raised any objection to their authenticity and, therefore, we will consider the submissions as part of the record.[26]

33. Whatever the frailties of the testimony of the Muckleshoot witnesses, as discussed in the Initial Decision, their testimony is corroborated fully by the *Sumner Lumber* record, at least insofar as concerns the historic use of the White River for the flotation of shingle bolts. The excerpts of the testimony of the 10 witnesses established that the White River was in fact a highway of shingle bolt commerce from points both above and below Buckley during the last decade of the nineteenth century and the first decade of the twentieth century, both

[26] Additionally, they are admissible under an exception to the hearsay rule as an historic public document. See Footnote 23, *supra*.

before and after the White River changed its course.[27] There were several mills along the White River in addition to the one at Sumner, including one on the Muckleshoot Indian Reservation, one just below the diversion dam at Buckley and one above the site of that dam, and the White River was the most economical method for moving shingle bolts to those mills. Furthermore, the bolts were not driven during freshets, but during periods of normal flows. And the photographs of a nineteen day drive in July and August 1911 show hollow wooden canoes, presumably of Indian origin, being used for driving the shingle bolts.

34. In *Economy Light & Power Company* v. *United States*, 256 U.S. 113 (1921), the Supreme Court held that the Desplaines River in Illinois was navigable even though it had not been used for commerce for almost one hundred years, stating, 256 U.S., at page 122:

> "Navigability, in the sense of the law, is not destroyed because the watercourse is interrupted by occasional natural obstructions or portages; nor need the navigation be open at all seasons of the year, or at all stages of the water.
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> * * *
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> "It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use."

The difference between the flotation of sawlogs and the flotation of shingle bolts goes to the manner of the use of a river rather than to its capability of use by the public as a highway

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[27] One witness, a Mr. Dieringer, testified that he and another individual operated a rented shingle mill above Buckley during the summer of 1892 and the following winter, and that he personally drove shingle bolts from Mud Mountain down the White River to that mill. Another witness, a Mr. Rawls, testified that it takes ten to eleven inches of water to drive shingle bolts and that he had just completed a drive of 1,600 to 1,800 cords. Three witnesses testified to the use of the White River for shingle bolt drives for 16 to 17, 17 to 18 and 18 to 19 years, respectively, and three others testified to its use for such drives for 20 or more years.

for transportation and commerce. So, too, the quantum of Indian canoe traffic would go to the extent of its use rather than to its capability of use.

35. In recent years the flotation of logs has been given increasing, if not dominent, importance in determining the navigability of waterways for purposes of the Federal Power Act. In *Wisconsin Public Service Commission* v. *Federal Power Commission*, 147 F.2d 743 (1945), the United States Court of Appeals for the Seventh Circuit affirmed a Commission decision that the upper reaches of the Wisconsin River were and are navigable waters of the United States because of their long, regular commercially successful use in the transportation of logs and rafts.[28] The same court, in *State of Wisconsin* v. *Federal Power Commission*, 214 F.2d 334 (1954), affirmed another Commission decision that the East Fork of the Chippewa River was and is navigable because of logging operations. And the United States Court of Appeals for the Second Circuit, in *The Connecticut Light and Power Co.* v. *Federal Power Commission*, No. 76-4212, decided June 27, 1977, appears to have given great weight to the flotation of logs in affirming still another Commission decision that the Housatonic River was and is navigable.

36. Upon reviewing the entire record, we are strongly persuaded that although the gradient of the White River is steep from Buckley downstream to a point several miles above Dieringer, the natural flows of the White River in that reach are sufficient both in volume and regularity to have supported its relatively simple use for the transportation of persons and property. We are strongly persuaded that the White River was in fact used by Indians at least as far upstream as the site of Puget Power's diversion dam at Buckley for transporting themselves and their property, and we so find. And there can be no

[28] The Seventh Circuit rejected the contention that the flotations in question were intrastate in character, noting that the river in question "constitutes a continuous highway over which commerce is or may be carried on with other states. So too, although the evidence herein establishes flotations only as far as Seattle before 1906 and only as far as Sumner after 1906, the White-Duwamish and the White-Stuck-Puyallup river systems were and are continuous highways of both interstate and foreign commerce.

question that the relevant reach of the White River was used for more than twenty years for the downstream flotation of shingle bolts from points both above and below Buckley. The White River unquestionably was and is a navigable water of the United States within the meaning of Section 3(8) of the Federal Power Act from both of its mouths at least to the vicinity of Puget Power's diversion dam at Buckley and, therefore, the Initial Decision to the contrary should be reversed.

REPLY BRIEF ON EXCEPTIONS

37. On September 20, 1976, the Muckleshoots and Interior filed a motion for leave to file a "Reply Brief on Exceptions" together with the brief, and on October 7, 1976, Puget Power filed a response in opposition. We will treat the motion as one to lodge a 1976 Supreme Court decision, although a copy of that decision is not physically attached, and grant it to that extent.[29] But we will deny the motion in all other respects since the brief would make further arguments on exception and is not authorized by 18 CFR § 1.31.

INTERVENTION

38. On October 14, 1976, the Department of Ecology of the State of Washington (Ecology) filed a petition for permission to intervene, stating that it is the agency which is responsible for administering Washington's water management programs and that it is expressly empowered to present the views and recommendations of the State of Washington with respect to projects relating to any waters located in the State of Washington, including any Federal license proposal. Ecology states that on July 15, 1976, two young girls drowned in the Stuck River in a surge of water which resulted from the combined operation of the Corps' Mud Mountain Dam and Puget Power's diversion dam and intake, that that tragedy has

[29] The decision in question is relevant to one of the theories of jurisdiction which is not addressed herein.

raised questions concerning the design and operation of both dams,[30] and that Ecology's interest is to assure "that the design and operational procedures relating to said dam(s) will not pose a threat to the safety of humans or their property." Finally, Ecology states that it does not wish to present additional evidence regarding jurisdiction and that it accepts the record as it is.

39. Puget Power, on October 22, 1976, filed an answer opposing Ecology's petition on the ground that it was filed more than nine years too late, and on the further ground that Section 308(a) of the Federal Power Act authorizes States, but not their agencies, to intervene: "It necessarily follows that when the Commission earlier granted intervention to the Washington State Department of Fisheries and (Department of) Game, the party that was being allowed to intervene was the State of Washington and that those two departments were merely its representatives." Accordingly, Puget Power would have Ecology coordinate its views with those of the Departments but would not permit it to intervene as a separate party. The Muckleshoots and Interior, on October 26, 1977, indicated that

[30] Ecology attached to its petition a copy of a document dated August 1976 and entitled, "White River Investigation And Analysis of Other Controlled Rivers". The investigation therein of the drowning indicates that the Corps began to release a small amount of storage from the Mud Mountain impoundment for a routine cleaning of sediment and debris, increasing the flow of the White River from 1,850 cfs to 2,636 cfs within a 10-minute span; that the resulting turbidity of the river caused Puget Power to close its diversion intake to protect its system, thereby redirecting the flow down the White River, and to remove the flashboards from its diversion dam, thereby releasing seven feet (in depth) of pondage, both within a 15-minute span; and that the resulting surge later transformed the Stuck River from a relative trickle into a rapid river in a matter of three to five minutes when it reached its victims some two miles upstream from the Dieringer tailrace. And Ecology concluded, among other matters, "The design, construction, and operation of the dam operated by Puget Power does not enable the operators opportunity to make controlled gradual changes in the rate of flow downstream under varied conditions."

they did not object to Ecology's proposed intervention.[31] And Ecology, on November 4, 1976, filed a response to Puget Power's answer.[32]

40. Ecology asserts in its response that 18 CFR § 1.1(f)(1) defines the term "person" to include state agencies, and that 18 CFR § 1.89(b) authorizes the filing of a petition to intervene by any "person" claiming an interest of such nature that intervention is appropriate to the administration of the Federal Power Act. We agree with Ecology and would note that the Commission has permitted state agencies to participate in administrative proceedings as separate parties on numerous occasions. We find that the area of concern of the Department of Ecology may not be adequately represented by the Departments of Fish and Game and, therefore, that Ecology should be permitted to intervene as a separate party.

The Commission further finds:

(1) Puget Sound Power & Light Company (Puget Power) is a corporation which is organized under the laws of the State of Washington.

(2) Puget Power owns, operates and maintains a water power development, known as the White River Project, in Pierce County, Washington, which project has an installed capacity of 63,400 KW, is connected to Puget Power's interconnected transmission system and generates electricity for transmission in interstate commerce.

(3) Puget Power operates and maintains a diversion dam in and across the White River, a navigable water of the United States, at or near Buckley, Washington, together with water conduits, reservoirs, a power house and other works of its White River Project incidental to the development of electric power across, along or in the White River, without having an existing right-of-way granted

[31] They attached to their filing a copy of an Agreement dated September 3, 1976, by which Puget Power and the Corps formulated certain operating procedures to minimize rapid fluctuations in river flows.

[32] The response is not authorized by 18 CFR § 1.8, but will be considered in the absence of objections.

prior to June 10, 1920, or a license granted pursuant to the Federal Power Act, in violation of Section 23(b) of the Federal Power Act.

(4) The Initial Decision holding that the relevant reach of the White River is not a navigable water of the United States should be reversed.

(5) Puget Power's request for permission to withdraw its license application for its White River Project should be denied, and Puget Power should be directed to refile its application with current information.

(6) The motion of the Muckleshoot Indian Tribe and the Secretary of the Interior for leave to file a "Reply Brief on Exceptions" should be granted insofar as it would lodge a recent court decision, and should be denied in all other respects.

(7) Participation in this proceeding by the Department of Ecology of the State of Washington may be in the public interest.

(8) The issues with respect to jurisdiction have been adequately briefed and, therefore, the motion of the Muckleshoot Indian Tribe and the Secretary of the Interior for leave to present oral argument should be denied.

The Commission orders:

(A) The Initial Decision issued March 3, 1976, holding that the relevant reach of the White River is not a navigable water of the United States, is reversed, and Puget Sound Power & Light Company's request for permission to withdraw its license application for its White River Project, Commission No. 2494, is denied.

(B) Within 60 days after issuance of this opinion and order, Puget Sound Power and Light Company shall refile its application for a license for its White River Project, Commission No. 2494, to provide current information as in the case of a new application for license. Such refiled application shall be self contained.

(C) The motion of the Muckleshoot Indian Tribe and the Secretary of the Interior for leave to file a "Reply Brief on Exceptions" is granted insofar as it would lodge a recent court decision, and is denied in all other respects.

(D) The Department of Ecology of the State of Washington is hereby permitted to intervene in this proceeding subject to the Rules and Regulations of the Commission; *Provided, however,* that participation by the said Department of Ecology shall be limited to matters affecting certain rights and interests specifically set forth in its petition to intervene and *Provided, further,* that the admission of the said Department of Ecology shall not be construed as recognition by the Commission that the intervenor might be aggrieved because of any order or orders of the Commission entered in this proceeding.

(E) The motion of the Muckleshoot Indian Tribe and the Secretary of the Interior for leave to present oral argument is denied.

(F) The exceptions with respect to all jurisdictional issues other than the navigability of the White River are not reached and are, therefore, not decided.

Appendix D

PUGET SOUND POWER AND LIGHT COMPANY—Project No. 2494

OPINION NO. 2-A

OPINION AND ORDER DENYING REHEARING
(Issued: August 9, 1978)

Before Commissioners: CHARLES B. CURTIS, Chairman; DON S. SMITH, GEORGIANA SHELDON, MATTHEW HOLDEN, JR., and GEORGE R. HALL.

Digest Section	Syllabus
2322.5	The Commission denies rehearing of Opinion No. 2 in which it found that a power company's river project is a jurisdictional water power project.

1. On November 25, 1977, Puget Sound Power and Light Company (Puget Power) filed an application pursuant to Section 313(a) of the Federal Power Act and § 1.34 the Commission's Rules of Practice and Procedure for rehearing of Opinion No. 2, issued October 28, 1977, in which the Commission found that Puget Power's White River Project is a jurisdictional water power project. On November 28, 1977, the Muckleshoot Indian Tribe (the Muckleshoots) and the Secretary of the Interior (Interior) filed a joint application for rehearing. The Commission, on December 27, 1977, granted rehearing for the limited purpose of further consideration.

2. Puget Power contends that we erred, first, by finding that the relevant reach of the White River is one of the "navigable waters" of the United States within the meaning of Section 3(8) of the Federal Power Act, and second, by applying Section 23(b) of the Federal Power Act to the White River Project which was constructed prior to its enactment and is situated on a non-navigable water.[1] Puget Power, the

[1] We understand Puget Power's contention to be that the outcome of this proceeding should be governed by *Farmington River Power Company* v. *Federal Power Commission*, 455 F.2d 86 (CA2, 1972).

Muckleshoots and Interior contend that we erred by addressing only one of the several theories of jurisdiction which were advocated at the hearing and argued in the briefs.

3. In 1912 Puget Power's predecessor, Pacific Coast Power Company, completed and placed into operation the first two generating units of the White River Project, and began to divert the waters of the White River; and in 1913 the Supreme Court of Washington held in *Sumner Lumber & Shingle Co.* v. *Pacific Coast Power Co.*, 131 P. 220, that the White River was not navigable between the diversion dam at Buckley and the powerhouse at Dieringer. Puget Power asserts in substance that we erred in reaching the opposite conclusion some 64 years later, relying in part upon portions of the same factual record as was considered by the Supreme Court of Washington.

4. We do not agree with Puget Power that the Washington and Federal tests of navigability "were exactly the same" prior to the time Congress defined the term "navigable waters" in Section 3 of the Federal Water Power Act of 1920 and the Supreme Court interpreted that term in *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377 (1940).[2] Nor do we agree with Puget Power that the Supreme Court of Washington reached its decision "after observing the demeanor

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[2] The Supreme Court of Washington said in *Sumner Lumber*,

> To be navigable or floatable in law, the stream must possess such characteristic in its natural state. If artifical means or aids are necessary in making use of the stream to float timber, the stream is not floatable.

But the Supreme Court of the United States said in *The Daniel Ball*, 77 U.S. 557, 563 (1871),

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

The use or susceptibility of use of rivers as highways for commerce "in their ordinary condition" does not preclude the utilization of aids such as those which were used to help move shingle bolts down the White River. Certainly, one could not rule out a wagon trail as being a highway for commerce simply because ferries or bridges are required to help move vehicles, or even animals alone. In 1913 the Washington test precluded artificial aids whereas the Federal test included the susceptibility concept which later evolved through *Appalachian* into the current suitability standard.

of the witnesses".[3] Today, we are bound to follow *Appalachian* and its subsequent interpretations and to apply a test of navigability which differs materially from the one utilized by the Supreme Court of Washington. The portions of the *Sumner Lumber* record which are before us establish persuasively that the White River was in fact a highway for shingle bolt commerce even though, as the Washington courts found, it was customary to go upon the banks or shoulders of that highway to keep that commerce moving.

5. We agree with Puget Power that the author of the statement, "Muckleshoot is some ten miles from the head of canoe navigation", was probably referring to the Muckleshoot Indian Reservation rather than the Muckleshoot Prairie. Opinion No. 2 does not draw an inference to the contrary, but merely calls attention to the testimony that the name "Muckleshoot", standing alone, might refer to the Prairie. In any event, we read the statement in context as saying, not that the Muckleshoot Indian Reservation was *inaccessible* by land or water, as Puget Power argues, but simply that it wasn't a sufficiently important location to warrant further expenditures because canoe navigation was limited to ten miles upstream and the wagon road was in poor condition. We believe that it is illogical to place the head of canoe navigation downstream from Auburn, as Puget Power contends, since steam vessels were able to reach Auburn.

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[3] *Sumner Lumber* involved an appeal from the Superior Court of Pierce County in which transcribed rather than live testimony was considered by the Supreme Court of Washington. As appears from the face of that opinion, 131 P., at page 222, the Superior Court of Pierce County observed the demeanor of the witnesses and reached the opposite conclusion:

> There is much testimony in the record as to whether it is possible to make a drive without the use of the banks . . . and, while there is no dispute as to the fact that no drive has been made without the use of the banks, the lower court seemed impressed with the opinions of witnesses that it could be done, and found "that in driving shingle bolts down the said rivers to plaintiff's mill drivers have been accustomed to frequently go upon the banks of the streams above the line of high-water mark, but that it is not necessary so to do, although it is necessary in driving to go upon the bed of the streams." Whether or not a drive could be made without the use of the banks, we are unable to say . . . It is apparent that, if dependency was had upon the natural condition of these streams, few, if any, shingle bolts would ever reach respondent's mill.

6. We also agree with Puget Power that the Administrative Procedure Act, 5 U.S.C. § 557(c), and the Commission's Rules of Practice and Procedure, 18 CFR § 1.30(g), require that all decisions include a statement of findings and conclusions, as well as the reasons or basis therefor, upon all material *issues* of law presented on the record. When we decide, however, that a water power project is jurisdictional under one of several legal theories which are advocated by the parties, the other theories cease to be material to that issue and need not be addressed in our decision.

We based our decision on the navigability of the White River because that was the principal jurisdictional theory developed in the record and argued in the briefs, and because there is a substantial body of case law on the subject. In finding jurisdiction on the primary theory of navigability, it is not necessary to reach the secondary and independent bases advocated by the parties.[4] Nor do the Administrative Procedure Act and the Commission's Rules of Practice and Procedure require discussions of theories which are not in fact reached and decided.[5] But if our decision on the primary theory of navigability is reversed and the other theories of jurisdiction are reached, we would request a remand to give them decisional consideration.[6]

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[4] *The Connecticut Light and Power Co.* v. *Federal Power Commission*, 557 F.2d 349 (CA2, 1977).

[5] "The second alleged procedural irregularity is the Commission's failure to make findings and conclusions upon 'other issues' even though it determined that the application must be denied on the grounds that appellant was financially unqualified. Section 8(b) of the Administrative Procedure Act [now 5 U.S.C. § 557(c)], upon which appellant relies, contains no such requirement. An agency, like a court, need not decide questions which are not relevant to its decision." (Footnote omitted.) *Deep South Broadcasting Company* v. *Federal Communications Commission*, 278 F.2d 264, 266 (CADC, 1960).

[6] All of the other potential bases of jurisdiction involve legal theories which lack the body of case law associated with navigability. In addition, it appears that the contention that the White River Project utilizes surplus water or water power from the Mud Mountain Dam was not developed adequately in the record and, as a result, that theory of jurisdiction could have been rejected for lack of proof, as distinguished from the merits. Alternatively, the record could have been remanded for further development of that theory, thereby consuming additional time without producing a meaningful result if jurisdiction premised on the navigability of the White River is sustained.

The Commission further finds:

The assignments of error and grounds for rehearing set forth in the applications for rehearing filed November 25 and 28, 1977, respectively, by Puget Sound Power and Light Company, and the Muckleshoot Indian Tribe and the Secretary of the Interior, present no facts or legal principles which would warrant any change in or modification of Opinion No. 2 and order issued October 28, 1977, except as that Opinion and order is clarified herein.

The Commission orders:

The applications for rehearing of Opinion No. 2 filed by Puget Sound Power and Light Company on November 25, 1977, and the Muckleshoot Indian Tribe and the Secretary of the Interior on November 28, 1977, are denied.

Article I, Section 8 of the United States Constitution provides in full:

> SECTION 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;
>
> To borrow Money on the credit of the United States;
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;
>
> To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;
>
> To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;
>
> To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;
>
> To establish Post Offices and post Roads;
>
> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;
>
> To constitute Tribunals inferior to the supreme Court;
>
> To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;
>
> To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
>
> To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;
>
> To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Appendix F

Section 23(b) of the Federal Power Act (16 U.S.C. § 817) provides in full:

> **Projects not affecting navigable waters; necessity for Federal license**
>
> It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this chapter. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter. If the Commission shall not so find, and if no public lands or reservations are affected, permission is granted to construct such dam or other project works in such stream upon compliance with State laws.

Appendix G

Section 3(8) of the Federal Power Act (16 U.S.C. § 796(8)) provides in full:

Definitions

The words defined in this section shall have the following meanings for purposes of this chapter, to wit:

. . .

(8) "navigable waters" means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority.

Section 4(e) of the Federal Power Act (16 U.S.C. § 797(e)) provides in full:

General Powers of Commission

The Commission is authorized and empowered—

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided,* That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations: *Provided further,* That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or

waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further,* That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further,* That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection.

Opposition

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No. 81-235

In the Supreme Court of the United States

OCTOBER TERM, 1981

PUGET SOUND POWER & LIGHT COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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MEMORANDUM FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

Petitioner contends that the court of appeals erred in upholding the Federal Energy Regulatory Commission's determination that the White River is a navigable waterway within the meaning of the Federal Power Act.

1. The Federal Energy Regulatory Commission is authorized to issue licenses for the construction, operation and maintenance of hydroelectric generating projects located on the navigable waters of the United States. See 16 U.S.C. 797(e), 817. Petitioner, an electric utility company, owns and operates a hydroelectric power plant on the White River in the State of Washington. In 1964, petitioner filed an application with the Commission seeking a determination that the Commission did not have licensing jurisdiction over petitioner's power plant, or, in the alternative (if the Commission were to find that it had jurisdiction), seeking the issuance of a license (Pet. App. 7c). Thereafter, in 1973,

petitioner sought to withdraw its license application, contending, *inter alia*, that the White River was not a navigable waterway in the area affected by the power plant (*id.* at 8c).

The Commission determined that the White River was a navigable waterway and that, therefore, pursuant to Section 23(b) of the Federal Power Act, 16 U.S.C. 817, petitioner must obtain a license to operate its power plant (Pet. App. 1c-24c). The Commission based its determination of navigability on evidence demonstrating that during the last decade of the Nineteenth Century and the first decade of this century, the White River had been used nearly year-round for transporting shingle bolts[1] from the nearby forests to the downstream lumber mills (*id.* at 11c-20c).

The court of appeals affirmed (Pet. App. 1a-7a), concluding that the Commission's finding of navigability was supported by substantial evidence.

2. The decision below is correct and does not warrant further review.

a. Petitioner contends (Pet. 10-21) that the test for navigability applied by the court of appeals is overly expansive. More specifically, petitioner argues (Pet. 14) that the decision below has "expanded the definition of navigability to the point where any stream bed over which small pieces of wood by 'constant handling' can be driven now qualifies as a 'navigable water of the United States.' " As the court of appeals explained (Pet. App. 5a), however, petitioner's "argument rests upon a misconception of the law. It is not the size of articles transported in commerce that establishes the navigable character of a waterway. Navigability depends upon the stream's usefulness as a transportation mechanism for commerce." Indeed, in *United States* v.

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[1] "Shingle bolts" are quartered logs about four feet long (Pet. App. 3a; 15c).

Appalachian Electric Power Co., 311 U.S. 377, 405-406 (1940), this Court emphasized "that the uses to which the streams may be put vary from the carriage of ocean liners to the floating out of logs; that the density of traffic varies equally widely from the busy harbors of the seacoast to the sparsely settled regions of the Western Mountains. The tests as to navigability must take these variations into consideration."

The court of appeals correctly held that the test for navigability was met here. There was substantial evidence before the Commission demonstrating that the White River was used to transport persons and property in commerce (Pet. App. 5a; 13c-18c). The river had supported light craft, primarily Indian canoes, as well as the cedar shingle bolt drives downstream. The drives came to an end only after petitioner's predecessor in interest diverted the river for its power plant.

Moreover, the fact that the shingle bolts needed handling to keep them flowing downstream is irrelevant under the federal law of navigability. Navigability "does not depend on the mode by which commerce is, or may be, conducted, nor the difficulties attending navigation." *United States* v. *The Montello*, 87 U.S. (20 Wall.) 430, 441 (1874). "There has never been doubt that the navigability referred to in the cases was navigability despite the obstruction of falls, rapids, sand bars, carries or shifting currents." *United States* v. *Appalachian Electric Power Co.*, *supra*, 311 U.S. at 408-409. Clearly, then, the need to propel the shingle bolts over or around obstructions does not defeat the finding of navigability.[2]

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[2]The administrative law judge, whose finding of non-navigability was reversed by the Commission, relied heavily for his conclusion on *Sumner Lumber & Shingle Co.* v. *Pacific Coast Power Co.*, 72 Wash. 631, 131 P. 220 (1913), which held that the White River was not

b. Petitioner further contends (Pet. 22-30) that the court of appeals failed to follow the "jurisdictional fact" doctrine of *Crowell* v. *Benson*, 285 U.S. 22 (1932), and that this Court should grant review to resolve an alleged conflict among the circuits on the proper interpretation of that doctrine. Whatever the present vitality of the holding in *Crowell* v. *Benson* (see *United States* v. *Raddatz*, 447 U.S. 667, 682-683 (1980); *id.* at 710 (Marshall, J., dissenting)), that case has no application here.

In *Crowell* v. *Benson*, *supra*, the Court held that the district courts had to make a de novo determination of the facts relevant to the exercise of administrative jurisdiction over claims filed pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* In reaching that result, the Court focused on the particular features of the statute's judicial review provisions (285 U.S. at 63-64):

> Assuming that the Federal court may determine for itself the existence of these fundamental or jurisdictional facts, we come to the question,—Upon what record is the determination to be made? There is no provision of the statute which seeks to confine the court in such a case to the record before the deputy commissioner or to the evidence which he has taken. The remedy which the statute makes available is not by an appeal or by a writ of certiorari for a review of his

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navigable (Pet. App. 11b-12b). As both the Commission (Pet. App. 15c-16c; 2d-3d) and the court below (Pet. App. 4a) correctly pointed out, however, the law judge's reliance on *Sumner Lumber* was misplaced because the state court in that case did not apply "the same test of navigability that the Commission was obligated to follow" here (*ibid.*). In any event, it is settled that a state determination regarding navigability is not binding on federal authorities. See *Brewer-Elliott Oil & Gas Co.* v. *United States*, 260 U.S. 77, 87 (1922).

> determination upon the record before him. The remedy is "through injunction proceedings, mandatory or otherwise." § 21(b). * * * By providing for injunction proceedings, the Congress evidently contemplated a suit as in equity, and in such a suit the complainant would have full opportunity to plead and prove * * * that the case lay outside the purview of the statute.

Here, in contrast, the statutory remedy for a person aggrieved by a Commission order is "review of such order in the United States court of appeals for any circuit * * *." 16 U.S.C. 825*l*(b). On that review "[t]he findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." Additional statutory support for the proposition that it is the record made before the Commission to which the reviewing court must confine itself is supplied by the further provision that the court

> may order * * * additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive * * *.

Thus, unlike the statute at issue in *Crowell* v. *Benson*, *supra*, the Federal Power Act provides for appellate review limited to the record adduced before the agency.[3]

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[3]It is readily apparent that unlike trial courts, reviewing courts such as the federal courts of appeals are not constituted to conduct de novo trials. Indeed, none of the court of appeals cases cited by petitioner (Pet. 25) on the "jurisdictional fact" issue involved a direct appeal from an agency to that court. Instead, each case concerned review of a district court's treatment of agency-found facts. Likewise, the issue in *United*

The court of appeals, therefore, properly reviewed the record created before the Commission, rather than attempt to make its own record. Moreover, the court correctly assessed that record under the "substantial evidence" standard, as directed by the Federal Power Act. Although the *Appalachian* decision in 1940 left open the question whether the substantial evidence test should be applied to review agency determinations concerning "jurisdictional facts" (311 U.S. at 402 n.7), in subsequent years the courts of appeals have consistently applied the substantial evidence test in cases of direct appeals from agency determinations—even where "jurisdictional facts" are at issue. See, *e.g.*, *Wisconsin Public Service Corp.* v. *FPC*, 147 F. 2d 743 (7th Cir.), cert. denied, 325 U.S. 880 (1945); *Rochester Gas & Electric Corp.* v. *FPC*, 344 F. 2d 594 (2d Cir. 1965).[4] In the absence of any conflict among the circuits on this issue, review by this Court is unwarranted.

States v. *Raddatz*, *supra*, was whether the trial court was required to conduct a de novo proceeding where a magistrate had conducted a hearing and made recommendations with respect to a motion to suppress evidence in a criminal case.

[4]Contrary to petitioner's suggestion (Pet. 23), the Court in *Appalachian* did not employ a *Crowell* v. *Benson*-type analysis. *Crowell* v. *Benson* required the trial court to make its own record, whereas in *Appalachian* the Court reached an independent determination based on the facts in the administrative record. 311 U.S. at 403-404. Even though the court of appeals here used the substantial evidence test rather than undertaking an independent examination of the evidence before the Commission, the court carefully reviewed the evidence and applied the proper legal test in sustaining the Commission's determination of navigability, and there is no reason to believe that the court would have reached a different result under the *Appalachian* approach.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Opposition

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and

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Intervenors.

ON PETITION FOR A WRIT OF CERTIORARI
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QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission's finding that the White River is navigable within the meaning of the Federal Power Act is supported by substantial evidence and was based on the proper legal standards.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-235

PUGET SOUND POWER & LIGHT COMPANY,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

and

WASHINGTON STATE DEPARTMENT OF FISHERIES, et al.,

Intervenors.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF INTERVENOR MUCKLESHOOT INDIAN TRIBE IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 644 F.2d 785 (1981). (Pet. App. 1a to 7a). The decision of the

Federal Energy Regulatory Commission ("Commission") is published at 13 Fed. Power Serv. 5-332 (October 28, 1977). (Pet. App. 1c to 24c). The Commission's opinion and order denying rehearing is published at 15 Fed. Power Serv. 5-1069 (August 9, 1978). (Pet. App. 1d to 5d). The Administrative Law Judge's opinion is published at 13 Fed. Power Serv. 5-352 (March 3, 1976). (Pet. App. 1b to 22b).

JURISDICTION

The decision of the Court of Appeals was entered on May 4, 1981. The Petition was filed within 90 days of that date, and jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 313(b) of the Federal Power Act, 16 U.S.C. § 825 l(b), provides that "The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive."

Section 3(8) of the Federal Power Act, 16 U.S.C. § 796(8) defines "navigable waters" for purposes of the Act as follows:

> "navigable waters" means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including herein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority.

STATEMENT OF THE CASE

1. Nature of the Petition

Petitioner ("Puget") seeks a review of the Court of Appeals decision which affirmed the finding of the Commission that the White River is a navigable water

within the meaning of the Federal Power Act.

2. Course of Proceedings Below

Puget and its predecessor in interest have operated a water diversion and hydroelectric power plant along the White River in Washington State since 1911. Puget's water power development generates electricity for transmission in interstate commerce. (Pet. App. 22c). For 64 years Puget maintained that its project was not subject to the licensing requirements of the Federal Power Act, 16 U.S.C. §§ 791, et seq. (Id. 1b).

This proceeding was commenced in the Commission on November 20, 1964, when Puget filed an Application for Determination of Jurisdiction and in the Alternative for License for the White River Project. The Muckleshoot Indian Tribe ("Tribe") intervened on November 20, 1973, to oppose Puget's motion to withdraw its

application and to protect various tribal interests discussed below.

After hearing and briefs, the Administrative Law Judge (ALJ) dismissed Puget's application for lack of jurisdiction in an opinion that held, inter alia, that the affected stretch of the White River does not constitute a navigable water as defined by Section 3(8) of the Federal Power Act, 16 U.S.C. § 796(8). (Pet. App. 1b, 22b). The ALJ's opinion was subsequently reversed by the Commission in a detailed and comprehensive opinion that directed Puget to refile its application for a license. (Id. 1c, 23c). The Commission's decision on the navigability of the White River was reviewed and affirmed by the court below as being supported by substantial evidence and based on the proper legal standards. (Id. 7a).

3. Statement of Facts and Interest of the Tribe

The Muckleshoot Indian Tribe is a federally recognized Indian tribe. (Pet. App. 8c, n.8). The Tribe resides on the Muckleshoot Indian Reservation which was established pursuant to the authority of the Treaty of Medicine Creek. (Id. 4c). The reservation is located along the White River at a point downstream from Puget's diversion. (Id.). The effect of Puget's diversion of the White River since 1911 has been to divert water around the Tribe's reservation and to adversely affect the anadromous fish in the river. (Id. 4c, 5c, n.6).

Puget's diversion adversely affects a number of important tribal interests. The reduction of the White River fish population has impaired the Tribe's federally protected on-reservation fishing rights that were reserved by the Treaty of Medicine Creek, 10 Stat. 1132, and upheld by

this Court in Washington v. Fishing Vessel Assoc., 443 U.S. 658 (1979). The Tribe has brought suit against Puget for illegally appropriating waters reserved for the Tribe and necessary to fulfill the purposes of the reservation. Muckleshoot Indian Tribe of the Muckleshoot Reservation v. Puget Sound Power & Light Company, No. 472-72C2 (W.D. Wa, amended complaint filed, July 1981).

Puget's description of the nature and usage of the White River (Pet. 5-6) overlooks parts of the record and important findings below.

The White River is a part of a river system that was and is a continuous highway of both interstate and foreign commerce. (Pet. App. 19c, n.28). It is undisputed that the relevant stretch of the White River in fact was used as a highway for commercial shingle bolt traffic for a twenty-year period (Id. 5a, 17c,

18c) "during periods of normal flow" (id. 18c)[1]; that such use was "the most, if not only, economically feasible method at that time of transporting shingle bolts to the lumber mills" (id. 5a, 18c); and that during the relevant period of Washington State history shingle bolts were a commercially valuable part of the State's lumber industry. (Id. 6a).

ARGUMENT

1. The Federal Power Act's Definition of "Navigable Waters," as Interpreted by This Court, Was Correctly Applied by the Commission and the Court Below

Puget repeatedly and erroneously argues that the Court of Appeals and the Commission "expanded" the definition of

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1/ Since Puget's 1911 diversion has largely precluded present use of the White River for navigation purposes, the evidence below was concerned with the documented historic use of the river prior to 1911. (Id. 2a). Because settlement of the region by non-Indians did not occur until the 1850s, the inquiry below was limited to a 50 to 60 year period (id. 12c).

"navigable waters" and created a "new test" for establishing navigability. (Pet. 10, 18). However, both the court below and the Commission expressly applied the definition of "navigable waters" as provided in Section 3(8) of the Federal Power Act, and interpreted by this Court in United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940). (Pet. App. 2a, 3a, 11c, 16c). Indeed, Puget did not contend in the court below that the Commission applied an erroneous test for determining the White River's navigability. (Id. 2a).

In arguing that the definition and test applied below greatly expanded the concept of navigability, Puget places great emphasis upon comparing the characteristics of the White River with the physical features of other rivers. (Pet. App. 14-18). Puget's analysis fails because it does not recognize that each

navigation case is unique and must necessarily be given independent consideration. Navigability "is not to be determined by a formula which fits every type of stream under all circumstances." United States v. Appalachian Electric Power Co., supra, 311 U.S. at 404. Puget's comparison of the evidence on White River usage to that in other cases also fails to take into account,

> that the uses to which the streams may be put vary from the carriage of ocean liners to the floating out of logs; that the density of traffic varies equally widely from the busy harbors of the seacoast to the sparsely settled regions of the Western Mountains. (Footnote omitted). The tests as to navigability must take these variations into consideration.

Id. at 405-06.

Puget's reliance upon a prior state court determination of non-navigability of the White River in Sumner Lumber & Shingle Co. v. Pacific Coast Power Co., 72 Wash. 631, 131 P. 220 (1913), is irrelevant for two reasons. (Pet. 6-8). First, as the

court below correctly ruled, the navigability test applied in Sumner is different from the applicable federal test. (Pet. App. 4a). In Sumner, the court applied the following test:

> To be navigable or floatable in law, the stream must possess such characteristics in its natural state. If artificial means or aids are necessary in making use of the stream to float timber, the stream is not floatable.

72 Wash. at 635, 131 P. at 222. In contrast, this Court has expressly rejected that limited test:

> To appraise the evidence of navigability on the natural condition only of the waterway is erroneous ... A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before navigation may be undertaken. Congress has recognized this in § 3, 16 U.S.C. § 796(8), of the Federal Power Act by defining 'navigable waters' as those 'which either in their natural or improved condition' are used or suitable for use.

United States v. Appalacian Electric Power Co., supra, 311 U.S. at 407.

Second, a holding on navigability under state law is not determinative under federal law. Brewer-Elliot Oil & Gas Co. v. United States, 260 U.S. 77, 87 (1922). See also Pet. App. 4a.

There is simply no basis for Puget's suggestion that the court below expanded the definition of navigability or did anything other than apply the Federal Power Act definition and well-established, controlling legal principles to the facts in the record.

2. The Jurisdictional Fact Doctrine of Crowell v. Benson is Not at Issue

Puget suggests that this case is important for review in order to resolve a conflict in the circuits on the vitality of the Jurisdictional Fact Doctrine of Crowell v. Benson, 285 U.S. 22 (1932). (Pet. 22-30). Assuming the Crowell doctrine is still good law in light of Estep v. United States, 327 U.S. 114, 142 (1946),

this case presents an inappropriate context in which to address the validity of that doctrine.

This case has arisen under the Federal Power Act. Section 313(b) of the Federal Power Act, 16 U.S.C. § 825 l(b), provides the exclusive, specific and complete method for judicial review of Commission orders. Safe Harbor Water Power Corporation v. Federal Power Commission, 124 F.2d 800, 804 (3rd Cir. 1941), cert. denied, 316 U.S. 663 (1942). Such reviews are conducted by courts of appeals, and Section 313(b) precludes any review of objections to Commission orders unless raised before the Commission in a rehearing motion.[2/] This Section places further

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2/ In the Petition, Puget argues, for the first time in this proceeding, that the Commission's decision violates the Commerce Clause, (Pet. 10-19), and that the decision may have impacts that are offensive to the Fifth and Tenth Amendments. (Id. at 18-19). Puget phrases the issue (Footnote continued on next page).

limitation on the role of reviewing courts where the scope of review of Commission findings of fact is involved:

> The findings of the Commission as to facts, if supported by substantial evidence, shall be conclusive.

This language expressly limits judicial review of Commission findings of fact to

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(Footnote 2 continued).
before this Court as follows:

> The proper scope of the federal government's regulatory powers under the Commerce Clause in light of the reservation of power contained in the Tenth Amendment is the issue in this case.

(Pet. 10). None of these constitutional objections or arguments were raised in Puget's application for rehearing filed before the Commission on November 25, 1977. 16 U.S.C. 825 L(b) reads, in pertinent part:

> No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure to do so.

There is no reasonable basis for Puget's failure to raise these constitutional objections in rehearing before the Commission. As such, this Court should refuse to consider them as being improperly raised for the first time before this Court. See Hormel v. Helvering, 312 U.S. 552, 556 (1941).

an inquiry of whether the findings are supported by substantial evidence.[3/] Gainesville Utilities v. Florida Power Corp., 402 U.S. 515, 527 (1971). Because of the plain language of Section 313(b) as applied by this Court in Gainesville Utilities, supra, the court below correctly interpreted Section 313(b), when it stated:

> The only remaining question is whether the Commission's finding of navigability is supported by substantial evidence. The Commission's finding as to the fact of navigability, if supported by substantial evidence, is conclusive.

(Pet. App. 3a).

Crowell v. Benson, supra, involved

3/ While a de novo standard of review is therefore precluded, Section 313(b) does permit parties to adduce additional evidence before the Commission with leave by the court. However, Puget never requested this relief in the court below. If Puget or the court below felt a need to adduce more facts on the navigability issue, Section 313(b) provides the appropriate mechanism.

judicial review of an administrative decision made under the Longshoremen's and Harbor Worker's Act, 33 U.S.C. §§ 901-950. Unlike the Federal Power Act, that statute contains no express limitations on reviewing administrative findings of fact. See 33 U.S.C. § 921(c); Crowell v. Benson, supra, 285 U.S. at 46. None of the circuit court cases cited by Puget at Page 25 of the Petition involved judicial review under Section 313(b) or any other statute with similar limitations.4/

4/ Puget's reliance on United States v. Appalachian Electric Power Co., 107 F.2d 769, 791 (4th Cir. 1939), rev'd, 311 U.S. 377 (1940), is misplaced because that case did not arise under Section 313(b). Rather, that case was initiated by the United States in federal district court as an action for an injunction. The Commission had never held any hearings or ruled on the navigability issue and the only finding concerned the effect of the dam on commerce. (Id. at 399-402). The Supreme Court was thus never presented with Section 313(b) or the Crowell doctrine and expressly did not decide that issue. (311 U.S. at 402, n.7). When the Supreme Court undertook an independent review of the

(Footnote continued on next page).

The Tribe suggests that, within the context of the Federal Power Act, the circumstances of this case do not present an appropriate opportunity to resolve circuit conflicts over the Crowell doctrine.

3. The Decision Below Properly Advances the Objectives of the Federal Power Act

Puget argues that because the Commission found navigability based upon the historic use of the White River, the Commission has no real interest in licensing its power project, and that its finding on navigability is merely a pretext "in order to reach other objectives." (Pet. 29 and 9). Puget then suggests that the impact of the decision below will cause Puget to "have to give their hydro-

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(Footnote 4/ continued).
concurrent findings of the courts below on navigability, it addressed itself to the two-court rule, which is a separate doctrine apart from the Crowell doctrine. (311 U.S. at 403-04).

electric facilities away," and other dire consequences violative of the Fifth and Tenth Amendments. (Pet. 18-21). These exact arguments were presented and rejected in United States v. Appalachian Electric Power Co., supra, 311 U.S. at 419-429. See also, Hodel v. Virginia Surface Mining & Reclamation Assoc., ___ U.S. ___, 69 L.Ed.2d 1 (June 15, 1981).

The need for Commission jurisdiction and regulation is amply demonstrated in the record. Puget's facility has not only destroyed navigation between Buckley and Dieringer but has severely damaged the White River fishery and impaired the purposes for which the Tribe's reservation was established to accomplish. Safety hazards as a result of the design, construction and operation of Puget's dam have caused two persons to drown and are a serious concern to intervenor state agencies. (Pet. App. 20c, 21c). Congress has

determined that matters of this nature require regulation. Commission regulation in the public interest requires comprehensive management for public safety (18 C.F.R. 12.2), protection of fish and wildlife, Udall v. Federal Power Commission, 387 U.S. 428, 450 (1967), and to protect the purposes and utilization of federal reservations, 16 U.S.C. § 797(e). Jurisdiction on the basis decided below is therefore consistent with the purposes of the Federal Power Act.5/

CONCLUSION

The Petition should be denied forthwith.

5/ In fact, Congress has only recently reaffirmed its longstanding policy to subject hydroelectric projects to federal regulatory authority and to insure proper environmental safeguards. See Section 408 of the Energy Security Act of 1980, 94 Stat. 718 and 16 U.S.C. § 823a (1981 Supp.).

Respectfully submitted,

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Petitioner's Reply Brief

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No. 81-235

In The

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FEDERAL ENERGY REGULATORY COMMISSION,
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WASHINGTON STATE DEPARTMENT OF FISHERIES,
WASHINGTON STATE DEPARTMENT OF GAME,
MUCKLESHOOT INDIAN TRIBE, AND
SECRETARY OF THE INTERIOR,
Intervenors.

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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WASHINGTON STATE DEPARTMENT OF FISHERIES,
WASHINGTON STATE DEPARTMENT OF GAME,
MUCKLESHOOT INDIAN TRIBE, AND
SECRETARY OF THE INTERIOR,
Intervenors.

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioner submits this reply memorandum in response to the memorandum of the Federal Energy Regulatory Commission and the brief of the Muckleshoot Indian Tribe in opposition to this Petition for Writ of Certiorari.[1]

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1. Petitioner's statement of parent companies, subsidiaries and affiliates was provided in the Addendum filed with its Petition for Writ of Certiorari.

I.

UNLESS REVIEW IS GRANTED AND THE DECISION OF THE NINTH CIRCUIT REVERSED, EVERY STREAM AND CREEK IN THE NATION WILL QUALIFY AS A "NAVIGABLE WATER OF THE UNITED STATES"

A. Limited Instances of Shingle Bolt Driving and Dragging Cannot Render a Body of Water a "Navigable Water of the United States."

Under the decisions of this Court, the definition of "navigable waters of the United States" has been shaped by practical considerations. *Leovy v. United States*, 177 U.S. 621, 632 (1900). As the Court recognized in *The Montello*, 87 U.S. (Wall.) 430, 442 (1874), "[I]t is not . . . every small creek in which a fishing skiff or gunning canoe can be made to float at high water, which is deemed navigable . . . ."

The Ninth Circuit, however, failed to recognize the limitations which have been placed upon the definition of this term. It held that evidence of sporadic instances of shingle bolt driving and dragging along the bed of the White River was sufficient, by itself, to support a finding of navigability. Pet. App. at 5a. It reached this conclusion even though shingle bolts are dramatically smaller than the tree trunk sized logs referred to in court opinions as "saw logs." Flotation of these much larger saw logs has been the absolute minimum test of navigability in federal case law until now. *Connecticut Light & Power Co. v. FPC*, 557 F.2d 349, 356 (2d Cir. 1977); *Wisconsin v. FPC*, 214 F.2d 334 (7th Cir.), *cert. denied*, 348 U.S. 883 (1954). Furthermore, the Ninth Circuit ignored the evidence in the record indicating that these instances of shingle bolt driving and dragging could

not have been accomplished without men illegally trespassing along the privately owned banks of the stream.

There is no question that there has never been commerce by boats along the White River. The Ninth Circuit itself refused to base its holding on the controverted evidence of light canoeing presented by the Muckleshoot Indian Tribe. Pet. App. at 5a. Nor is there any question that the shingle bolt driving and dragging could not have been accomplished without the constant handling of these small pieces of wood by teams of men and horses. As the Ninth Circuit itself acknowledged:

> The bolts required nearly constant handling by the drivers to break up jams, free those bolts that were lodged on the banks and shallow area, and direct them down the main channel of the river.

Id. By holding that a finding of navigability may be supported by such minimal evidence, the Ninth Circuit dramatically expanded the definition of "navigable waters of the United States" to the point where it includes every body of water over which small pieces of wood can be dragged or driven by teams of men and horses. Such a result is contrary to the decisions of this Court and extends the power of the federal government beyond the limits of the Commerce Clause of our Constitution.

B. The Physical Characteristics of the White River Are More Adverse to Navigation than Those of any River Found Navigable by any Court.

Both the Federal Energy Regulatory Commission and the Muckleshoot Indian Tribe have justified the Ninth Circuit's conclusion by referring to language in decisions of this Court which indicates that a finding of navigability may be supported despite the presence of obstacles to navigation.

E.g., United States v. Appalachian Electric Power Co., 311 U.S. 377, 408-09 (1940); *The Montello, supra*, 87 U.S. (Wall.) at 441. These decisions do not support the holding reached in this case. Navigation of the White River is not simply interrupted by the presence of falls, rapids, sand bars or shifting configurations. Navigation of the White, as that term has previously been defined, is instead rendered impossible by the existence of a slope three times more steep than that of any river held navigable by any court, a flow volume 200 cfs less than that which has previously been considered marginal for supporting navigation, and a large amount of debris, gravel and sediment which dominates its varying channel. *See* Pet. at 14-15; *United States v. Appalachian Electric Power Co., supra; Rochester Gas & Electric Corp. v. FPC*, 344 F.2d 594 (2d Cir.), *cert. denied*, 382 U.S. 832 (1965); *Montana Power Co. v. FPC*, 185 F.2d 491 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 947 (1951). In fact, neither the Federal Energy Regulatory Commission nor the Muckleshoot Indian Tribe has challenged Petitioner's assertion that the physical characteristics of the White River are more adverse to navigation than those of any river previously found navigable by any court.

Because the Ninth Circuit has permitted a dramatic expansion of the definition of "navigable waters of the United States" beyond the limits established by this Court, review by Writ of Certiorari is appropriate.

II.

THE JURISDICTIONAL FACT DOCTRINE OF *CROWELL v. BENSON* IS AT ISSUE IN THIS CASE

By expanding the definition of navigability to include all bodies of water over which shingle bolts can be driven

or dragged, the Federal Energy Regulatory Commission unilaterally broadened the scope of its own jurisdiction beyond its previously recognized limits. Now virtually any body of water in the United States will be subject to the control of the Federal Energy Regulatory Commission. This type of attempt by a federal agency to expand its own jurisdiction was the prime reason the Court in *Crowell v. Benson*, 285 U.S. 22 (1932) held that all determinations of fact by federal agencies upon which their own jurisdiction depends should be reviewed by the federal judiciary on a de novo basis. The Ninth Circuit's failure to apply the "jurisdictional fact" doctrine of *Crowell v. Benson* in this case, therefore, places the continued vitality of that doctrine directly into question.

The Federal Energy Regulatory Commission and the Muckleshoot Indian Tribe have erroneously argued that the jurisdictional fact doctrine has no applicability here. They argue that the doctrine only applies in cases where the statute providing for judicial review of an agency order indicates that the reviewing court is not bound to review the agency order under a substantial evidence standard. They then point to that portion of the Federal Power Act which states that when a Court of Appeals reviews an Order of the Federal Power Commission (now the Federal Energy Regulatory Commission), it shall uphold the Commission's findings "as to the facts, if supported by substantial evidence . . . ." 16 U.S.C. § 825 1(b). Memorandum for the Federal Energy Regulatory Commission in Opposition at 5 and n.3; Brief for Intervenor Muckleshoot Indian Tribe in Opposition at 14.

This argument ignores the reasoning behind the jurisdictional fact doctrine. The Court in *Crowell v. Benson*

established the jurisdictional fact doctrine because it recognized that the Constitution vested the federal judiciary with the sole responsibility for ensuring that the federal agencies do not trespass beyond the limits of their jurisdiction. Instead of permitting a federal agency to be the final arbiter on the extent of its jurisdiction, therefore, the Court stated that the federal courts should review an agency's determinations of facts necessary to establish its own jurisdiction on a de novo basis. Further, the Court indicated, the federal judiciary's responsibility for making these de novo determinations could not be stripped by any act of Congress:

> In relation to these basic facts, the question is not the ordinary one as to the propriety of provision for administrative determinations. . . . It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency . . . for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. . . . That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law.

285 U.S. at 56-57 (footnotes omitted).

Consequently, under *Crowell v. Benson*, Congress does not have the power to strip the federal judiciary of its responsibility for making de novo determinations of jurisdictional facts decided by the Federal Energy Regulatory Commission. Until *Crowell v. Benson* is overruled by this Court, therefore, that provision of the Federal Power Act purportedly preventing the federal courts from reviewing Commission orders under a standard more strict than the substantial evidence standard can only be constitutional

if construed solely to apply to the review of the Commission's ordinary factual determinations, and not to the Commission's determinations of facts essential to establishing its jurisdiction.

In conclusion, as the Federal Energy Regulatory Commission itself has acknowledged, this Court has not resolved the question whether determinations of jurisdictional facts by the Federal Energy Regulatory Commission should be reviewed under a substantial evidence or de novo standard. Memorandum for the Federal Energy Regulatory Commission in Opposition at 6. In addition, neither the Federal Energy Regulatory Commission nor the Muckleshoot Indian Tribe has attacked Petitioner's analysis of the current split among the Circuit Courts of Appeal on the continued applicability of the principles embodied in the jurisdictional fact doctrine. Petitioner therefore submits that this case presents the Court with the opportunity to resolve this issue, the split among the Circuit Courts of Appeal, and any other question concerning the continued vitality of the jurisdictional fact doctrine of *Crowell v. Benson*.

Respectfully submitted,

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